

Book Review

The Insanity Defense

THE INSANITY PLEA. By William J. Winslade* and Judith Wilson Ross.†
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Reviewed By
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I. PUBLIC OPINION AND THE INSANITY DEFENSE

The traditional insanity defense is both a legal anachronism and a concept ill-suited to modern psychological theory. It presents issues—important issues—that are not susceptible of intelligent resolution in the courtroom environment. Trials in which the insanity defense has been raised often have degenerated into swearing contests between opposing teams of expert witnesses, all of whom are forced to translate the language of the psychiatric profession into the quite alien language of the legal profession. It is this attempt to marry these two incompatible disciplines that has created the current confusion.¹

Public opinion reveals opposition to the insanity defense,² with the view often expressed that too many criminals escape punishment by pleading and, in some instances, feigning insanity.³ The general view is that the insanity defense is too frequently used and is too often a means for defendants to escape their just punishment.⁴

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1. *The Insanity Defense: Hearings Before the Comm. on the Judiciary of the United States Senate on Bills to Amend Title 18 to Limit the Insanity Defense*, 97th Cong., 2d Sess. 9 (1982) (statement of Senator Orrin G. Hatch) [hereinafter cited as *Hearings on the Insanity Defense*].

2. See Lauter, *Why Insanity Defense Is Breaking Down*, Nat'l L.J., May 3, 1982, at 1, col. 1. The author reports: "[A]n Associated Press/NBC News poll showed that 87 percent of the public believed that too many murderers were using insanity pleas to avoid jail. Nearly 70 percent would have banned insanity defenses altogether in murder cases." *Id.* at 11, col. 1.

3. See *Behind Growing Outrage over Insanity Plea*, U.S. NEWS & WORLD REP., May 7, 1979, at 41; see also I. S. YOCHELSON & S. SAMENOW, *THE CRIMINAL PERSONALITY* 529–30 (1975). See generally A. BROOKS, *LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM* 318 (1974).

4. See generally Cohen, *It's a Mad, Mad Verdict*, NEW REPUBLIC, July 12, 1982, at 13; *The Insanity Plea on Trial*, NEWSWEEK, May 24, 1982, at 56; *Is the System Guilty*, TIME, July 5, 1982, at 22.

A second strain of adverse public opinion centers on the perceived misuse of psychiatry by defendants⁵ or reflects simply a general distrust of psychiatrists, who are viewed as providing an excuse for crime for any defendant who has the means or opportunity to "employ" a psychiatric witness.⁶

A third source of public dissatisfaction with the insanity defense is a perception that those who successfully plead the insanity defense are freed from any institutional restraint⁷ or, even when hospitalized, are released too quickly by mental health authorities.⁸ The general view is that the insanity defense results in dangerous persons being set free into the community with a likelihood that they will continue to commit violent and dangerous acts.⁹

Empirical studies increasingly reveal that much of this public opinion is mistaken,¹⁰ although a need to examine the formulation and operation of the insanity defense persists. Legal commentators¹¹ and medical authorities,¹² as well as bar

5. See Gallo, *The Insanity of the Insanity Defense*, HUMAN EVENTS, Sept. 26, 1981, at 12, where the author observes:

The Hinckley affair, as well as a number of other notorious criminal cases, has focused attention on the extent to which psychiatry has undermined justice in the United States by justifying criminality. As a result, a growing number of lawmakers, jurists, and even psychiatrists are suggesting sweeping changes in insanity pleadings at both the state and federal levels.

6. See Egan & Levin, *An Attorney's View of the Insanity Defense*, LOY. MAG., Summer 1982, at 7. The authors report:

The insanity defense is criticized on many levels. Some object to the defense because they believe it is only available to the rich. It is only the rich, they say, who can afford to hire the psychiatrists necessary to present a successful defense. Hinckley prevailed, according to this view, because his father could "purchase" the testimony necessary to achieve a "Not Guilty" result.

Id. at 8.

7. See *The Controversy over Criminal Insanity*, PSYCHOLOGY TODAY, May 1983, at 49, where it is observed: The criminal-justice system has been shaken by two widespread misconceptions about defendants judged "not guilty by reason of insanity" (NGRI). The first is that many of these offenders are really sane and escaping punishment in hospitals. The second is that hospitals and courts are releasing both the sane and the genuinely insane so soon that society is menaced by their return.

8. See Burton & Steadman, *Legal Professionals' Perceptions of the Insanity Defense*, 6 J. PSYCHIATRY & L. 173 (1978). The authors report on the opinion of 293 legal professionals in New York State on the use and administration of the insanity defense. While the authors report a relatively accurate perception of the actual percentages of the crimes for which people were tried and acquitted under the New York insanity statute, they observe:

At the other end of the dispositional process, 74% of the respondents felt that the current standards of release of NGRI defendants from mental hygiene facilities were too lax . . . DA's and judges were most critical, with 90% of the DA's and 79% of the judges feeling that release standards are too lax, compared to 60% of the public defenders and 52% of the private attorneys.

Id. at 180.

9. See *supra* notes 1-4 and accompanying text.

10. See Pasewark, *Insanity Plea: A Review of the Research Literature*, 9 J. PSYCHIATRY & L. 357, 361 (1981) [hereinafter cited as Pasewark, *Research Literature*]. The author observes:

[T]he available data suggest that accurate information is not held by elements of the population concerning such matters as the incidence and success of the plea and who does or does not belong to the general group of the criminally insane. Perhaps, this inaccurate information contributes to the negative feelings by many groups.

Id.

11. See, e.g., Bonnie, *The Moral Basis of the Insanity Defense*, 69 A.B.A. J. 194 (1983). The author, a legal scholar, states as his basic premise that "[s]weeping proposals to abolish the insanity defense should be rejected in favor of proposals to narrow it and shift the burden of proof to the defendant." *Id.* at 194; see also Dershowitz, *Abolishing the Insanity Defense: The Most Significant Feature of the Administration's Proposed Criminal Code—An Essay*, 9 CRIM. L. BULL. 434 (1973).

12. See, e.g., Prelinger, *Dilemmas of the Expert Witness: Reflections on the Insanity Defense*, 13 PSYCHIATRIC ANNALS 237 (1983). The author observes, "In my own view [the insanity defense] serves, among other things, the preservation of a meaningful concept of individual responsibility in our society." *Id.* at 238. The author recommends

associations¹³ and psychiatric associations,¹⁴ while recognizing a moral and legal need to retain the insanity defense, recently have recommended various reforms of the defense. Some commentators have suggested that the control or impulse ground for the insanity defense be eliminated, confining the defense to a showing of lack of appreciation or understanding by one accused of crime.¹⁵ Others have suggested that evidence of mental disorder be limited to defeating a requisite mental state, a position that effectively would abolish the defense.¹⁶ Reforms in the manner in which the defense is established have also been proposed, including, for example, the suggestion that the burden of proof of insanity should be cast as an affirmative defense and

restrictions on the scope of psychiatric testimony on the ultimate question of responsibility. He concludes, "I have come to see merit in the view that psychiatric and psychological expert witnesses should not answer this [ultimate] question [T]he role of expert witness would be redefined as that of a provider of facts, observations, and qualified inference and opinion." *Id.* at 240; see also Stone, *The Insanity Defense on Trial*, 33 HOSP. & COMMUNITY PSYCHIATRY 634 (1982).

13. See STANDING COMM. ON ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, A.B.A., FIRST TENTATIVE DRAFT CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-6.1 (1983). A supporting memorandum reports:

In re-examining the insanity defense, the options for change were limited. The first option was to retain ABA policy favoring the cognitive-volitional test embodied within the ALI's Model Penal Code. The next option was to restrict the defense by eliminating the "volitional" prong of the ALI test while retaining and perhaps redefining the "cognitive" portion of that test. Finally, the last option was to adopt the "mens rea" approach—an approach which would eliminate insanity as an independent, exculpatory doctrine. This option—the so-called "mens rea" limitation—was rejected out of hand. It represents the abolitionist approach and would do away with an independent, exculpatory defense of insanity. Such a jarring reversal of hundreds of years of moral and legal history would constitute an unfortunate and unwarranted overreaction to the Hinckley verdict.

Id. § 7-6.1 commentary at 7-262. The ABA chose the second option. *Id.* § 7-6.1.

14. See, e.g., *American Psychiatric Association Statement on the Insanity Defense*, reprinted in 140 AM. J. PSYCHIATRY 681-88 (1983). The statement provides, "The American Psychiatric Association, speaking as citizens as well as psychiatrists, believes that the insanity defense should be retained in some form." *Id.* at 683. The statement continues:

This area for potential reform of the insanity defense is one of the most controversial. Some proposals would limit psychiatric testimony in insanity defense trials to statements of mental condition A further limitation upon psychiatric "ultimate issue" testimony would be to restrict the psychiatrist from testifying about whether a defendant did or did not meet the particular legal test for insanity at issue The American Psychiatric Association is not opposed to legislatures restricting psychiatric testimony about the aforementioned ultimate legal issues concerning the insanity defense.

Id. at 686.

15. See, e.g., *Hearings on the Insanity Defense*, *supra* note 1, at 255, where, in a prepared statement, Richard J. Bonnie, professor of law and Director of Institute of Law, Psychiatry and Public Policy, University of Virginia, asserted his criticism of a separate control test for insanity:

I do not favor abolition of the "cognitive" prong of the insanity defense. However, I do agree with those critics who believe the risks of fabrication and "moral mistakes" in administering the defense are greatest when the experts and the jury are asked to speculate whether the defendant had the capacity to "control" himself or whether he could have "resisted" the criminal impulse.

Id. at 276. Bonnie proposes that "[t]he sole test of legal insanity should be whether the defendant, as a result of mental disease, lacked 'substantial capacity' to appreciate the wrongfulness of his conduct." *Id.* at 278; see also MESSAGE OF THE PRESIDENT OF THE UNITED STATES TRANSMITTING A PROPOSAL FOR LEGISLATION ENTITLED THE "COMPREHENSIVE CRIME CONTROL ACT OF 1983," H.R. DOC. NO. 98-32, 98th Cong., 1st Sess. 170 (1983). See generally D. HERMANN, *THE INSANITY DEFENSE: PHILOSOPHICAL, HISTORICAL AND LEGAL PERSPECTIVES* 137-52 (1983).

16. See, e.g., *Hearings on the Insanity Defense*, *supra* note 1, at 26-31 (statement of Attorney General William French Smith). The Attorney General testified in support of a bill that "would effectively eliminate the insanity defense except in those rare cases in which the defendant lacked the state of mind required as an element of the offense." *Id.* at 29. According to the Attorney General,

This would abolish the insanity defense to the maximum extent permitted under the Constitution and would make mental illness a factor to be considered at the time of sentencing, just like any other mitigating factor. It would eliminate entirely as a test whether a defendant knew his actions were morally wrong and whether he could control his behavior.

Id. at 30.

placed on the defendant.¹⁷ In addition, commentators have suggested revisions of the methods in which psychiatric evidence is presented to the judge or jury, revisions seeking to avoid confusion and to prevent psychiatric witnesses from effectively determining the ultimate issue of responsibility.¹⁸

While many of the suggested reforms may improve the operation of the defense of insanity, most lawyers and psychiatrists would not recommend that the defense be eliminated. A strong movement to eliminate the insanity defense, however, is supported by some commentators,¹⁹ legislators,²⁰ and public officials.²¹ Two states, Montana²² and Idaho,²³ effectively have eliminated the insanity defense, Idaho providing that "[m]ental condition shall not be a defense to any charge of criminal conduct."²⁴ This abolitionist movement seems most effectively to meet the demands of public opinion.

To the extent that the abolitionist movement is supported by the public, two basic issues arise: (1) Is public opposition to the insanity defense well founded?; and (2) If public perceptions about the abuse and failings of the defense are not supported by fact, what is the source of the public misconceptions? In one of the most extensive studies of public opinion about the insanity defense, conducted in Wyoming, the general public,²⁵ legislators,²⁶ attorneys,²⁷ law enforcement personnel, and mental

17. See, e.g., *Hearings on the Insanity Defense*, *supra* note 1, at 18-24 (statement of Senator Dan Quale). Senator Quale recommended legislation to "place the burden of proof upon the defendant to establish the defense of insanity by a preponderance of the evidence." *Id.* at 19.

18. See, e.g., G. MORRIS, *THE INSANITY DEFENSE: A BLUEPRINT FOR LEGISLATIVE REFORM* (1975). The author recommends that the legislature enact the following statute:

In a criminal case in which defendant has served notice of intent to defend on the ground of irresponsibility, the trial court shall order, upon defendant's request, that evidence shall be presented first on whether defendant committed the act that would constitute the crime if the requisite mental state for criminal responsibility is also proven. At the completion of the presentation of this evidence, the jury shall determine whether the act was committed by the defendant.

If the jury finds that the act was not committed by the defendant, the court shall enter a judgment of not guilty. If the jury finds that the act was committed by the defendant, the trial shall resume before the same jury, which shall hear evidence on whether the requisite mental state for criminal responsibility existed at the time defendant acted. At the completion of the presentation of this evidence, the jury shall determine the guilt or innocence of the defendant.

Id. at 47-48.

19. See, e.g., N. MORRIS, *MADNESS AND THE CRIMINAL LAW* (1982). The author recommends, "In accordance with the thesis of separation of the mental health law and the criminal-law powers to incarcerate, I propose the abolition of the special defense of insanity." *Id.* at 53.

20. See, e.g., *Hearings on the Insanity Defense*, *supra* note 1, at 91-94 (statement of Senator Larry Pressler).

21. See, e.g., *Limiting the Insanity Defense: Hearings Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 97th Cong., 2d. Sess. 308-20 (1982) (statement of David H. Leroy, Attorney General for the state of Idaho). See also Smith, *Limiting the Insanity Defense: A Rational Approach to Irrational Crimes*, 47 MO. L. REV. 605 (1982). Attorney General William French Smith stated the view of the Department of Justice on limiting the insanity defense:

Having re-examined the matter in light of the recent public debate, we in the Department have again concluded that the soundest approach is: (1) to eliminate insanity as a special defense and to permit conviction of any defendant as long as both the conduct and the state of mind specified in the applicable penal statute are found to exist beyond a reasonable doubt.

Id. at 615.

22. MONT. CODE ANN. §§ 45-2-101(36), 46-14-102, 46-14-201 (1981).

23. IDAHO CODE § 18-207(a) (Supp. 1983).

24. *Id.*

25. See Pasewark & Scidenzahl, *Opinions Concerning the Insanity Plea and Criminality Among Mental Patients*, 7 BULL. AM. ACAD. PSYCHIATRY & L. 199 (1979).

26. See Pasewark & Pantle, *Insanity Plea: Legislator's View*, 136 AM. J. PSYCHIATRY 222 (1979).

27. See Pasewark & Craig, *Insanity Plea: Defense Attorneys' Views*, 8 J. PSYCHIATRY & L. 413 (1980).

health personnel²⁸ were questioned about their perceptions and attitudes toward the insanity defense. The results of these surveys indicate that each group grossly overestimated the frequency of use and the success of the plea.²⁹ Court records show that during the period of the study only 102, or 0.47%, of those charged with criminal offenses entered an insanity plea, and only one defendant was successful in obtaining a verdict of not guilty by reason of insanity.³⁰ Nevertheless, estimates of the frequency of its use ranged from thirteen percent by state hospital professional staff to fifty-seven percent by state hospital aides.³¹ Community residents estimated that forty-three percent of all criminal defendants entered the plea.³² The successful employment of the defense was also grossly overestimated, with estimates ranging from nineteen percent by community mental health professionals³³ to thirty-eight percent by the general public.³⁴ All groups surveyed, with the exception of state legislators, expressed the opinion that the defense of insanity should be abolished.³⁵

One of the most informative and most disturbing of the Wyoming surveys was that conducted among university students. The students estimated that thirty-seven percent of all persons charged with a felony entered an insanity plea and that forty-four percent of the persons pleading insanity were acquitted.³⁶ The authors of this report concluded:

[R]espondents appear to believe that the insanity plea is too often employed as a mechanism whereby persons charged with a crime escape culpability for their criminal action. Contributing to this belief seems to be a gross misimpression held concerning both the number of persons who make the plea as well as the number who are eventually successful in the plea. In this, for lack of a better explanation, we are forced to assume that the basis for the misinformation held about the plea derives from widespread publicity given to notorious [not guilty by reason of insanity] cases by the various media.³⁷

The negative opinion toward the insanity defense stems from a myriad of factors. One study reports that jurors with negative attitudes toward an insanity plea are most influenced by stereotyped images of offenders, as well as by negative attitudes toward psychiatry.³⁸ Another study reports that dissatisfaction with the insanity defense is based on a judgment that the defense is poorly defined and is often based on superficial and incompetent medical testimony, as well as on "preconceived ideas about the defendant 'getting off.'"³⁹ Perhaps one of the most telling studies is a public opinion survey conducted in New York in 1975.⁴⁰ This study first attempted to

28. See Pasewark, Seidenzahl & Pantle, *Opinions About the Insanity Plea*, 8 J. FORENSIC PSYCHOLOGY 63 (1981).

29. Pasewark, *Research Literature*, *supra* note 10, at 360.

30. *Id.*

31. Pasewark, Seidenzahl & Pantle, *supra* note 28, at 66.

32. Pasewark, *Research Literature*, *supra* note 10, at 360.

33. Pasewark, Seidenzahl & Pantle, *supra* note 28, at 66.

34. Pasewark, *Research Literature*, *supra* note 10, at 360.

35. *Id.*

36. Pasewark & Seidenzahl, *supra* note 25, at 201.

37. *Id.* at 202.

38. Arafat & McCahery, *The Insanity Defense and the Juror*, 22 DRAKE L. REV. 538, 548-49 (1973).

39. Burton & Steadman, *supra* note 8, at 177.

40. Steadman & Coccozza, *Selective Reporting and the Public's Misconceptions of the Criminally Insane*, 41 PUB. OPINION Q. 523 (1978).

determine how the public perceived the criminally insane and whether those perceptions were accurate. The researchers reported that "[t]he public's conception of the criminally insane is dominated by fear of the unpredictability and the danger they are perceived to present."⁴¹ The public's image of the criminally insane, its perception of the incidence of the insanity defense, and its conception of the criminal context in which the defense was asserted were found to be "highly erroneous": "Whereas murderers make up a very small segment of all the individuals who are usually [found] insane, murderers or alleged murderers, particularly presidential assassins or mass murderers, were the only type repeatedly named by respondents."⁴²

The researchers concluded that the false public perceptions were a result of distorted media reporting, reasoning that the public's awareness of the criminally insane was dependent on the media and that "[w]hen such dependence is coupled with selective reporting, and/or distorted dramatizations, false perceptions are developed."⁴³ The researchers concluded their report with an observation of the danger attendant to distorted reporting and consequential erroneous public opinion: "The false perceptions are then related to inappropriate fear, which in turn can be seen reflected in restrictive legislation and questionable public policy. In the public's fear of the criminally insane, selective news reporting appears to have contributed through the development of false perceptions."⁴⁴

II. *THE INSANITY PLEA*

A. *Introduction*

The Insanity Plea,⁴⁵ by William Winslade and Judith Ross, is a general critique of the insanity defense directed toward the general public, which deals with a series of reported cases. This book will probably reinforce erroneous public opinion on the subject of the insanity defense. It also will probably be used by the general public as commanding evidence to support abolition or substantial restriction of the defense. The public may consider this book authoritative in part because Winslade is a co-director of the Program in Medicine, Law and Human Values, and an adjunct professor of law and medicine, at the University of California, Los Angeles. Because the public is likely to rely on this widely distributed book, it merits close examination.

The Insanity Plea is based on trial transcripts and judicial opinions from seven prominent cases in which psychiatric evidence was introduced;⁴⁶ the cases do not all involve insanity pleas. The authors explain that they have relied on these official records, rather than conducting interviews or engaging in other basic research, to give the reader a juror's perspective on these cases.⁴⁷ However, the book is barren of

41. *Id.* at 532.

42. *Id.* at 531.

43. *Id.*

44. *Id.*

45. W. WINSLADE & J. ROSS, *THE INSANITY PLEA* (1983) [hereinafter cited as *THE INSANITY PLEA*].

46. *Id.* at xi.

47. *Id.*

citation or other reference that would be useful to anyone who wishes to critically evaluate the authors' interpretation of the record of these cases. This review will attempt to supply citations to official accounts of these cases to the extent that they are readily available.

1. *Underlying Assumption that the Guilty Go Free*

The authors state the premise of their book quite simply:

The not guilty by reason of insanity plea is not used very often and is not very often successful. But when it is successful, the result is frequently such an obvious abuse of the idea of insanity and nonresponsibility that the verdict enrages the public and tarnishes both the legal system and the psychiatric profession.⁴⁸

Winslade and Ross recommend eliminating the insanity plea and removing psychiatrists as expert witnesses at trials.⁴⁹

An underlying assumption of the book which is not supported by any empirical proof is that the insanity defense results in a number of "guilty" people "go[ing] free."⁵⁰ According to the authors,

These people go free because their lawyers have successfully pursued a plea of not guilty by reason of insanity by hiring psychiatrists to examine the defendant and to testify to his mental incapacities and to the personal weaknesses that suggest he not be held responsible for the crime he is charged with. These defendants can go free because some lawyers and some psychiatrists are willing to manipulate juries and the criminal justice system precisely in those areas where judgment is most difficult: where judgment is based upon imagining what was in a person's mind when he committed an act.⁵¹

This view is subject to two criticisms. The first approach is to question the authors' assertion that lawyers and psychiatrists "manipulate" juries to produce acquittals that are not supported by the law and the facts of the case. The issue, assuming that the insanity plea provides a legitimate defense, is whether counsel and witnesses misstate the facts or confuse jurors so that the jurors are induced to find an unsupported verdict. Empirical studies of jury deliberations involving the defense of insanity do not support the authors' assertion. Rita James Simon's study, *The Jury and the Defense of Insanity*,⁵² provides major findings that are quite contrary to the assumption made by Winslade and Ross. Simon reports:

48. *Id.* at 19.

49. *Id.* The full recommendation of the authors is stated at the conclusion of the book:

A workable solution would require the elimination of the insanity plea; the elimination of any testimony by psychiatrists about the actual or theoretical state of the defendant's mind at the time of the crime; the elimination of psychiatric expert witnesses in the guilt phase of a trial; and the requirement of a bifurcated trial that would, in its first phase establish guilt or innocence of the commission of the crime with no concern for the individual's state of mind in terms of mental illness at the time the crime was committed. The second phase of the trial, if guilt were found, would address itself to the appropriate disposition of the defendant.

Id. at 219.

50. *Id.* at 2.

51. *Id.*

52. R. SIMON, *THE JURY AND THE DEFENSE OF INSANITY* (1967).

The first and perhaps most important observation is the jury's concern with the case. The jurors relied very heavily on the record. They reviewed every piece of evidence presented during the trial and they placed particular emphasis on the details surrounding the defendant's behavior at the time of the crime. The opinions they formed about the defendant were developed in reaction to the particular circumstances surrounding the crime.⁵³

Simon's study also controverts the suggestion by Winslade and Ross that the defendant goes free because "some psychiatrists are willing to manipulate juries" or, alternatively, that "the defendant goes free because psychiatrists and psychologists—presumed to be expert witnesses on the contents and functioning of the human mind—have been asked by lawyers and are permitted by law to tell us who is responsible and who is not; who is guilty, and who is insane."⁵⁴ Simon reports:

We think that the data demonstrate that the jury recognizes the distinction between a clinical diagnosis and the application of a moral legal criterion, and they understand it is the latter which they must use in deciding the case. . . .

The jury realizes that the expert is emphasizing only one aspect of the problem, the clinical part, and that his testimony contributes little or nothing to the main dilemma facing the jury—that of placing the clinical or purely medical facts about the defendant into a moral-legal context. . . .

. . . [M]ost of the jurors, most of the time, recognized that the final responsibility for the defendant's fate rested with them.⁵⁵

The second criticism appropriately directed at the assumption underlying *The Insanity Plea* is an objection to the equation of guilt, that is, criminal guilt or legal responsibility, with causal responsibility of a person for acts of harm or injury that underlie a criminal charge. Winslade and Ross make the general observation that "[p]erhaps the bottom line of all these complaints is that guilty people go free—guilty people who do not have to accept judgment or responsibility for what they have done and are not held accountable for their actions."⁵⁶ Regarding insanity acquittees in particular, the authors assert: "These are not cases in which the defendant is alleged to have committed a crime. Everyone knows *he did it*."⁵⁷ Thus, the suggestion is made that causal responsibility is or should be the necessary and sufficient basis for criminal guilt. But this surely is not the view of the criminal law as it has developed in Anglo-American societies. Causal responsibility must be joined to both a voluntary act and a requisite mental state for criminal responsibility to be found.⁵⁸ In addition, for criminal guilt to be found, the defendant must not be justified in his action, as in self defense, or excused as a result of some incapacity or recognized attendant circumstance like infancy, mistake, or necessity.⁵⁹

53. *Id.* at 175–76.

54. *THE INSANITY PLEA*, *supra* note 45, at 2–3.

55. R. SIMON, *supra* note 52, at 177.

56. *THE INSANITY PLEA*, *supra* note 45, at 2.

57. *Id.* at 3 (emphasis added).

58. *See, e.g., Brown v. State*, 28 Ark. 126 (1873). The court observed, "In law, the commission of a crime consists in the joint operation of act and intent or criminal negligence." *Id.* at 128; *see also People v. Green*, 27 Cal. 3d 1, 609 P.2d 468, 164 Cal. Rptr. 1 (1980).

59. *See* MODEL PENAL CODE § 2.02 comment at 123 (Tent. Draft No. 4, 1955). The general requisites for criminal liability are set forth as follows:

[C]lear analysis requires that the question of the kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of the crime [and] the concept of "material

The authors' equation of criminal guilt with causal responsibility has much broader implications than a mere challenge to the insanity defense. Winslade and Ross challenge the basic concept of criminal responsibility and its requirement of a culpable mental state. They thus join others like Barbara Wootton who have suggested the elimination of *mens rea* as a requisite for criminal liability.⁶⁰ The ground for the attack on the mental element requirement is that a state of mind is not a fact susceptible of proof; the authors argue:

"Who did it?" is a question of fact, one that is, at least theoretically, capable of being answered definitively. "What was the perpetrator's state of mind when he did it?" is not a question of fact, for we do not even know what we mean by "state of mind," cannot define its elements, and, even if we could, would have no way of telling whether the definitions were met in a given case.⁶¹

According to Winslade and Ross, the problems with the mental state requirement generally are made more acute with the insanity defense: "With an insanity defense the trial asks a question about an internal, subjective phenomenon, about the state of mind, which cannot be observed by others, photographed by cameras, or tested retroactively."⁶² The authors seemingly qualify their position when they observe that although "there is no external, direct evidence of state of mind," there may be

element" includes the facts that negative defenses on the merits as well as the facts included in the definition of the crime.

Id.

60. Although Winslade and Ross do not refer to the work of Barbara Wootton, her views have either heavily influenced or, at least, are strikingly similar to those of the authors on both the issue of mental state and the defense of insanity. See B. WOOTTON, *CRIME AND THE CRIMINAL LAW* (1963). Wootton summarizes her conclusion in these terms:

The conclusion to which the argument leads is, I think, not that the presence or absence of the guilty mind is unimportant, but that *mens rea* has, so to speak—and this is the crux of the matter—*got into the wrong place*. Traditionally, the requirement of the guilty mind is written into the actual definition of a crime. No guilty intention, no crime, is the rule. Obviously this makes sense if the law's concern is with wickedness: when there is no guilty intention, there can be no wickedness. But it is equally obvious, on the other hand, that an action does not become innocuous merely because whoever performed it meant no harm. If the object of the criminal law is to prevent the occurrence of socially damaging actions, it would be absurd to turn a blind eye to those which were due to carelessness, negligence or even accident. The question of motivation is *in the first instance* irrelevant.

But only in the first instance. At a later stage, that is to say, after what is now known as a conviction, the presence or absence of guilty intention is all-important for its effect on the appropriate measure to be taken to prevent a recurrence of the forbidden act.

Id. at 52–53 (emphasis in original). The similarity of the argument made by Winslade and Ross to Wootton's position is apparent in the conclusion of *The Insanity Plea*; Winslade and Ross write: "Any solution must of necessity eliminate the hope of finding some way to assess mental states accurately. We must, at least as long as our knowledge is limited, give up on that as one of the elements of our resolution." *THE INSANITY PLEA*, *supra* note 45, at 219. The issue of culpable mental states and, consequently, evidence of mental illness, would be relegated to a dispositional hearing according to the recommended reform offered by Winslade and Ross: "Adversarial psychiatric testimony would be limited to clinical assessments, and would not include predictions or postdictions of behavior. The second phase of trial would also require assessments of treatability." *Id.* at 220.

61. *THE INSANITY PLEA*, *supra* note 45, at 8.

62. *Id.* at 9. The authors assert, "A trial that features an insanity defense . . . asks 'did the man mean to fire the gun and cause the injury?' or 'could he or did he *choose* to fire the gun?' None of the factual evidence is relevant here." *Id.* (emphasis in original). See B. WOOTTON, *supra* note 60, at 74, where Wootton maintains, "Logic, experience and the Lord Chief Justice thus all appear to lead to the same conclusion—that is to say, to the impossibility of establishing any reliable measure of responsibility in the sense of a man's ability to have acted otherwise than as he did." According to Wootton, "The questions: who broke the window? and could the man who broke the window have prevented himself from doing so? are obviously quite distinct. To dismiss the second as unanswerable in no way diminishes the importance of finding an answer to the first." *Id.* at 76.

"indirect evidence"; this indirect evidence, however, is dismissed by the authors as "weak" or at best subject to various "interpretations."⁶³

Several objections can be made to eliminating the mental element as a requisite for criminal culpability. First, some offenses have knowledge or intention as a necessary feature.⁶⁴ For example, the crimes of murder and involuntary manslaughter are differentiated by the quality of the mental state that accompanies a killing.⁶⁵ Of course, one can argue that this distinction should be eliminated and killing simply should be denominated as the crime of homicide. Even with all killing punished as homicide, however, if a defense of justification, such as self defense, is to exist, the question of whether the requirements of the defense are met will arise. This question will necessarily include an inquiry about the defendant's mental state if the defense is predicated on a requirement of reasonable fear that one's life was in jeopardy.⁶⁶

Second, even if one could eliminate the mental state requirement, the question arises whether this change in the law would be desirable. The law has long recognized that in human experience persons distinguish intended results from accidental happenings. People distinguish benefits received from others that are intended from those that are unintended and are the necessary or accidental side effects of another's action; gratitude is expressed to another person in a case of intended benefit while it usually is withheld in the case of unintended benefit. Similarly, a person usually distinguishes the conduct of others intended to do him harm from conduct which accidentally or unintentionally has a harmful effect on him. Mr. Justice Holmes distilled this general experience in the aphorism, "[E]ven a dog distinguishes between being stumbled over and being kicked."⁶⁷ The criminal law embodies this universal distinction in the concept of the mental state requirement, and the law distinguishes between the seriousness of crimes on the basis of whether a harm was intended or not. To eliminate the mental state requirement would be to deny the criminal law the ability to make distinctions that are common to human experience.

A third objection to eliminating the mental state requirement is that this choice would deprive the law of a richer notion of accountability than is provided by mere causal responsibility; it would deprive the law of a principle that promotes ethical and legal values. The influence of the concept of responsibility based on distinguishing conduct that is done purposefully, intentionally, or knowingly has long been viewed as an important influence on human behavior. As one commentator observed:

63. THE INSANITY PLEA, *supra* note 45, at 9.

64. See W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 27, at 191-95 (1972) ("The Mental Part—In General") [hereinafter cited as HANDBOOK ON CRIMINAL LAW].

65. See, e.g., MODEL PENAL CODE § 210.2 (Proposed Official Draft 1962). Section 210.2 provides in part, "[C]riminal homicide constitutes murder when: (a) it is committed purposely or knowingly; or (b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life." *Id.* Section 210.3 provides in part, "Criminal homicide constitutes manslaughter when: (a) it is committed recklessly; or (b) a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse." *Id.* § 210.3.

66. See, e.g., MODEL PENAL CODE § 3.04 (Proposed Official Draft 1962). Section 3.04 provides for a justification of killing based on self defense and declares in part: "[T]he use of force upon or toward another person is justified when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion." *Id.*

67. O.W. HOLMES, THE COMMON LAW 3 (1881).

[T]he individual who perceives himself as free and responsible behaves very differently than the individual who believes that he lacks choice and responsibility. In general, the direction of this difference is toward a higher level of awareness, initiative, achievement, independence and complexity for those who perceive themselves as freely choosing to behave in certain ways and as responsible for their behavior.⁶⁸

A fourth, perhaps crucial response to the position taken by Winslade and Ross focuses on whether the mental state is a fact that can be established. The authors are ambiguous in their position; it is unclear whether they are denying that mental states are facts, or simply asserting that it is difficult to establish or disprove a specific mental state given a particular action. If the former, they are simply wrong; if the latter, the issue is whether one has sufficient confidence in the indirect evidence developed through inference from one's own mental state when acting in a similar manner, or in judgments based on the credibility of a person claiming or denying that a particular mental state accompanied his action. The factual nature of a given mental state, such as one's intent, has long been recognized as a decidable issue in the law. As one commentator has observed:

Evidence one way or another for the existence of a particular specific intent is publicly available, just as is evidence of any other feature of the act. Why one traveled to Chicago may call for inference and surmise from things said and done as well as from circumstances that would normally prompt a trip of one sort or another. The evidence is no different from that available to determine the purpose being pursued in any other act; and certainly determinations of purpose are commonly and confidently made when necessary in many kinds of legal proceedings, as well as everywhere else in life.⁶⁹

The position taken in *The Insanity Plea* suffers from too great an influence of logical empiricism, which requires verification by empirical proof to establish truth.⁷⁰ The authors' standard of factual evidence to establish mental state or intent, and insanity, is simply too stringent;⁷¹ such a high standard of proof for subjective states in the criminal law cannot be reconciled with the law's willingness to recognize a broad range of subjective facts such as "pain and suffering" in tort law and "agreement" in contract law.

68. Monahan, *Abolish the Insanity Defense?—Not Yet*, 26 *RUTGERS L. REV.* 719, 723 (1973).

69. H. GROSS, *A THEORY OF CRIMINAL JUSTICE* 101 (1979).

70. See A.J. AYER, *LANGUAGE, TRUTH AND LOGIC* 35 (rev. ed. 1946), where a leading proponent of logical empiricism sets out the verification theory of meaning:

The criterion which we use to test the genuineness of apparent statements of fact is the criterion of verifiability. We say that a sentence is factually significant to any person, if, and only if, he knows how to verify the proposition which it purports to express—that is, if he knows what observations would lead him under certain conditions, to accept the proposition as being true, or reject it as being false.

71. See J. BRENNAN, *THE MEANING OF PHILOSOPHY* 63–66 (1953). The author identifies some of the principal objections to the logical empiricist's verification of meaning:

1. This doctrine lays down an arbitrary and narrow definition of "meaning" in *advance of the argument* and therefore begs the question. . . .

2. Another objection concerns the vagueness of the word "verifiable." It is not at all clear just what specification must be met in order that a sentence may be considered verified.

Id. at 63–64 (emphasis in original).

2. *Psychiatric Testimony*

The argument developed in *The Insanity Plea* does not rest entirely on the claim of lack of verification of mental state in general or insanity in particular. Rather, the authors argue that even if mental state or insanity are facts or conditions that have a factual quality, psychiatry has little or nothing to offer the courts or juries in the determination of the existence of a mental condition, particularly a mental state or condition accompanying some past act. Winslade and Ross bring the scientific status of psychiatry into question:

Psychiatry does not have the kind of scientific base that exists for such areas as forensic pathology. Much psychiatric theory is still disputed, with great disagreements existing about what kind of behavior is abnormal, whether abnormality is a function of heredity or environment, whether abnormality can be manifested psychologically without a physical, bodily component, and whether diagnoses are anything more than descriptions.⁷²

More particularly, the authors question the value of psychiatric diagnosis to jurors called on to make judgments about mental illness. It is suggested, first, that diagnostic labels are misleading since they often give an "impressive-sounding name" to ordinary observable behavior, or, alternatively, that diagnoses suffer from vagueness and imprecision.⁷³ The core of the attack on the value of psychiatric evidence, however, centers on three assertions: (1) that "[t]he bulk of psychiatric testimony does not rest on any kind of testing," but "[r]ather, it is the psychiatrist's impressions drawn from a series of interviews with the defendant"; (2) that "when it comes to diagnoses, there is ample research evidence that there will be substantial disagreement"; and (3) that psychiatric testimony about diagnosis is "opinion only."⁷⁴ The general assertion is that psychiatric testimony about the defendant's mental condition at the time of a crime is worthless because "[a]ll he [the psychiatric expert] knows is what the defendant tells him. And the defendant who is planning to make an insanity plea has every reason to tell the psychiatrist whatever he thinks will get him off."⁷⁵

This critique of psychiatric testimony as it relates to diagnosis is not accurate. The first assertion, that the psychiatric diagnosis does not rest on testing, but only on statements of the defendant, is far from reality. A standard text of law and psychiatry describes a proper psychiatric evaluation as having three parts: "a physical examination; a history of the person and his family; and a mental status examination."⁷⁶ A physical examination aims to determine whether a brain tumor or any brain abnormality is present.⁷⁷ The examination requires sophisticated instrumentation,

72. *THE INSANITY PLEA*, *supra* note 45, at 10.

73. *Id.*

74. *Id.* at 10-11.

75. *Id.* at 11.

76. Gerard, *Psychiatric Evaluation*, in A. BROOKS, *supra* note 3, at 21, 22; see Nicholi, *History and Mental Status*, in *THE HARVARD GUIDE TO MODERN PSYCHIATRY* 25 (A. Nicholi ed. 1978); Weiss, *The Clinical Use of Psychological Tests*, in *THE HARVARD GUIDE TO MODERN PSYCHIATRY* 41 (A. Nicholi ed. 1978).

77. Gerard, *supra* note 76, at 22.

such as an electroencephalograph, which records the electrical activity of the brain. An examination of the patient's history includes a consideration of present illness and of past, social, and family history.⁷⁸ Information about the person's present illness includes the mode of onset and the signs and symptoms of disorder. This data is complemented with information about past medical history, evidence of history of mental illness in the family, and information about the person's past behavior and relationships. To acquire this information, not only the patient, but also family members, fellow workers, and others who have known the subject, must be interviewed by the examining physician or psychiatric social workers. Finally, the mental status examination to which Winslade and Ross seem to refer is clearly a more complex matter than simply judging whether the statements of the subject are truthful. According to a standard text, "The mental status examination is commonly, but incorrectly, thought of as constituting the entire psychiatric evaluation. The mental status examination consists of six parts: (1) general appearance and behavior; (2) stream of talk; (3) affect; (4) thought content; (5) sensorium; and (6) insight and judgment."⁷⁹ A proper psychiatric evaluation leading to diagnosis is obviously much more complex than Winslade and Ross suggest. While a psychiatric evaluation may in any particular case fall short of these standards, a proper complaint should be directed to the particular examination and not to the process in general.

The second assertion in *The Insanity Plea* is that necessarily there "will be substantial disagreement in any group of psychiatrists about how to categorize behavior."⁸⁰ This claim is equally open to objection. Admittedly, a number of studies done in the 1960s suggested that psychiatrists examining the same subject frequently disagreed in their diagnosis.⁸¹ However, studies done in the last decade have demonstrated much higher reliability and agreement on diagnosis.⁸² The development of the current diagnostic system used by clinicians, DSM-III, has been accompanied by demonstrations in field trials showing that good agreement and reliability in diagnosis can be achieved.⁸³ Moreover, disagreement, when it does occur, is not generally disagreement over the presence of a mental disorder or even about the class of disorder. One study reports:

[There is] good agreement as to whether or not the patient has a disorder within the diagnostic class, even if there may be a disagreement about the specific disorder within the class. For example, diagnosis of paranoid schizophrenia and catatonic schizophrenia by two clinicians would be considered agreement in schizophrenia.⁸⁴

78. *Id.*

79. *Id.* at 23.

80. THE INSANITY PLEA, *supra* note 45, at 10-11.

81. See, e.g., Beck, Ward & Mendelson, *Reliability of Psychiatric Diagnosis: II. A Study of Consistency of Clinical Judgments and Ratings*, 119 AM. J. PSYCHIATRY 351, 351-57 (1962); Sandifer, Pettus & Quade, *A Study of Psychiatric Diagnosis*, 139 J. NERVOUS MENTAL DISEASE 350, 350-56 (1964).

82. See, e.g., Helzer, Clayton & Pambakian, *Reliability of Psychiatric Diagnosis: II. The Test/Retest Reliability of Diagnostic Classification*, 34 ARCHIVES GEN. PSYCHIATRY 136, 136-41 (1977); Spitzer, Endicott & Robbins, *Diagnostic Criteria: Rationale and Reliability*, 35 ARCHIVES GEN. PSYCHIATRY 773, 773-82 (1978).

83. Grove, Andreasen, McDonald-Scott, Keller & Shapiro, *Reliability Studies of Psychiatric Diagnosis*, 38 ARCHIVES GEN. PSYCHIATRY 408, 408 (1981).

84. Spitzer, Forman & Nee, *DSM-III Field Trials: I. Initial Interrater Diagnostic Reliability*, 136 AM. J. PSYCHIATRY 815, 816-17 (1979).

Therefore, evidence of substantial agreement on psychiatric diagnosis exists, contradicting the authors' easy assertion to the contrary.

A third assertion is made by Winslade and Ross that "[w]hen a psychiatrist gives his opinion in a court case, it is truly his opinion only."⁸⁵ This view is rooted in the authors' basic premise that psychiatry does not have a firm scientific base; they observe: "Much psychiatric theory is still disputed, with great disagreements existing about what kind of behavior is abnormal, whether abnormality is a function of heredity or environment, whether abnormality can be manifested psychologically without a physical, bodily component, and whether diagnoses are anything more than descriptions."⁸⁶ Psychiatrists do often disagree about a particular diagnosis and, even more significantly, on fundamental premises about psychological disorder. Some psychiatrists view mental illness as an organic matter; others identify the source of psychopathology in disordered mental processes.⁸⁷ Nevertheless, although different schools of psychiatry exist, this does not deny them scientific status. Each of the major schools has a theoretical paradigm, is based on empirical studies, and has been subject to verification by repeatable exercises.⁸⁸ The diagnosis certainly will have embedded within it the fundamental tenets of the school of psychiatry to which the practitioner making the diagnosis subscribes. This fact, however, reveals that a diagnosis is not mere opinion; rather, diagnosis involves the intersection of specific observation and general theory.

3. *Erosion of Individual Responsibility*

Perhaps the most basic argument that Winslade and Ross make against the insanity defense is that it undermines the concept of individual responsibility. According to *The Insanity Plea*, this erosion of individual responsibility takes two forms. The first follows from the assertion that "law and psychiatry are philosophically incompatible."

The law tells us that if we commit illegal acts, we must be punished. But the law assumes that we have freely chosen to perform these acts. Psychiatry does not make any such assumption about free will or choice. Psychiatric theory is deterministic and assumes that behavior is caused, shaped, or determined by prior events—either immediate events or those in the distant past—or by physiological states.⁸⁹

Whether any necessary philosophical conflict exists between law and psychiatry concerning determinism and free choice is largely beside the point. The relationship between law and psychiatry in the context of the insanity defense does not require consideration of this purportedly deep conflict. It is true that certain insanity tests, such as the product rule, ask whether criminal conduct is caused by mental disease,⁹⁰

85. *THE INSANITY PLEA*, *supra* note 45, at 10.

86. *Id.*

87. See A. HOLLINGSHEAD & F. REDLICH, *SOCIAL CLASS AND MENTAL ILLNESS* 155-61 (1958), reprinted in A. BROOKS, *supra* note 3, at 8-13.

88. T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 73 (1970).

89. *THE INSANITY PLEA*, *supra* note 45, at 12.

90. See *Durham v. United States*, 214 F.2d 862, 874 (D.C. Cir. 1954), *overruled*, *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972). *Durham* adopted the product test for insanity, which provided that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." *Id.*

and the irresistible impulse test requires a finding of a causal connection between a mental disease and a crime.⁹¹ The causal relation requirement of these tests is a good reason for rejecting these tests for insanity; it is this causal requirement which ultimately led to the rejection of the product test in the District of Columbia.⁹² However, it is clear that this direct causal connection between mental disorder and a crime is not required under the traditional test for insanity as developed under the *M'Naghten* rules,⁹³ which require a determination of whether mental disease impaired the defendant's ability to understand the nature and significance of his conduct. The crucial difference in terms of the causal significance of mental disease between these two approaches to the insanity test has been given explicit recognition by the courts.⁹⁴

The differentiation that avoids the conflict of law and psychiatry which Winslade and Ross see as inevitable was established by Aristotle when he distinguished *efficient cause*, the antecedent circumstance or agent that produced an effect, and the *final cause*, or the purpose or reason for which an effect was produced.⁹⁵ It is the distinction between efficient cause and final cause that provides the basis for psychiatric explanations and legal inquiry to be joined. According to one commentator,

The difference of the *how* and the *why* can be viewed in terms of causality. For our purposes we can regard causes as of two kinds: those which imply *deterministic necessity* and those which imply *purpose*. Science is mainly concerned with how things come about. . . .

The criminal trial is a forum for the determination of the fact of the wrong-doing and the question "why" is implicit in the process of making a moral judgment and of attaching a condemnation and penalty on the convicted wrong-doer. . . .

In law, this implicit "why" is conveyed in the legal terms which qualify behavior. Thus, did the wrong-doer have "intent"; did he act out of "malice aforethought, willfulness with premeditation," etc.? These qualifications are imposed on those who are to make judgment.⁹⁶

91. See *Parson v. State*, 81 Ala. 577, 597, 2 So. 854, 866-67 (1887), which sets out the elements of the irresistible impulse test for insanity as follows:

[H]e may nevertheless not be legally responsible if the two following conditions concur: (1) If, by reason of the duress of such mental disease, he had so far lost the *power to choose* between right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed; (2) and if, at the same time, the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it *solely*.

Id. (emphasis in original).

92. *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972), *overruling* *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).

93. *M'Naghten's Case*, 8 Eng. Rep. 718, 722 (H.L. 1843) provided that to establish the defense of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong.

94. See *United States v. Brawner*, 471 F.2d 969, 991 (D.C. Cir. 1972). The court analyzed the standard for the insanity defense that it adopted in terms of its causal element: "The rule contains a requirement of causality, as is clear from the term 'result.' Exculpation is established not by mental disease alone but only if 'as a result' defendant lacks the substantial capacity required for responsibility." *Id.*

95. ARISTOTLE, *Metaphysics*, in *THE BASIC WORKS OF ARISTOTLE* 689, 693 (R. McKeon ed. 1941). According to Aristotle,

[C]auses are spoken of in four senses. In one of these we mean the substance, i.e. the essence (for the 'why' is reducible finally to the definition, and the ultimate 'why' is a cause and principle); in another the matter or substratum, in a third the source of change, and in the fourth the cause opposed to this, the purpose and the good (for this is the end of all generation and change).

Id. at 693. See generally R. SORABJI, *NECESSITY, CAUSE AND BLAME* (1980).

96. P. ROCHE, *THE CRIMINAL MIND: A STUDY OF COMMUNICATION BETWEEN THE LAW AND PSYCHIATRY* 10-11 (1958).

Thus, with the exception of the product and irresistible impulse tests for insanity, adopted by only a minority of jurisdictions,⁹⁷ the psychiatrist is not asked to explain the causes of a person's action. Rather, the psychiatric expert is asked whether the defendant suffered from a mental disease and, if so, how that disease is likely to have affected the defendant's ability to understand what he was doing or to control his conduct.⁹⁸ The jury is given responsibility for determining whether, as a result of mental illness, the defendant lacked understanding, appreciation, or control in his behavior to a degree that he should not be held culpable.⁹⁹ The ultimate issue is whether the defendant lacked the malicious intent or guilty mind that is a condition for blame and for the just imposition of criminal punishment.¹⁰⁰

The second way, according to Winslade and Ross, in which the insanity defense undermines the concept of individual responsibility is the manner in which it encourages empathetic feelings or identification of shared "dark impulses" by the jurors with the accused.¹⁰¹ Purportedly, the insanity plea creates a situation whereby the jurors inappropriately identify with the defendant:

We are then free to find some part of ourselves in their story: the anger *we* would have felt . . . the rage *we* would have had to control . . . the agony *we* would have endured We can imagine the rage, anger, hopelessness, and bitterness that such situations call forth in humans. *We* would not act upon those feelings ourselves, of course. We would control them and act within the stern and clear requirements of duty, hope, and the perfectibility of our intentions. But we see that there are others who do not, and perhaps cannot, accept the yoke of those requirements.¹⁰²

97. See G. MORRIS, *supra* note 18, at 89 (reporting that eleven states employ an irresistible impulse test to supplement other insanity test formulations and two states, Maine and New Hampshire, have adopted the product test formulation).

98. See, e.g., H. GOULETT, *THE INSANITY DEFENSE IN CRIMINAL TRIALS* (1965). This textbook for the trial lawyer gives the following admonition:

Principally, the examiner must understand clearly that he is not to determine the abstract ability of the accused to know right from wrong, or abstract ability to refrain from committing criminal acts. The law wants to know whether the defendant knew at the time of the offense that the particular act was wrong (*M'Naghten*) and whether he was able to refrain from committing the crime charged (irresistible impulse). If the answer is negative there must be a mental disease which deprived the defendant of the requisite intellectual or volitional faculties.

Id. at 53-54.

99. See, e.g., *United States v. Brawner*, 471 F.2d 969, 1006 (D.C. Cir. 1972). The court described the functions of psychiatric experts and juries under the Model Penal Code test for insanity as follows:

The rule contemplating expert testimony as to the existence and consequence of a mental disease or defect is not to be construed as permission to testify solely in terms of expert conclusions. Our jurisprudence to the contrary is not undone, it is rather underscored. It is the responsibility of all concerned—expert, counsel and judge—to see to it that the jury in an insanity case is informed of the expert's underlying reasons and approach, and is not confronted with ultimate opinions on a take-it-or-leave-it basis. . . .

. . . The jury will consider this testimony under the instruction or need to acquit if as a result of mental disease or defect there is a lack of substantial capacity to control the behavior in question (or appreciate its wrongfulness). We think this sufficiently communicates to the jury the kind of hard question it is called upon to decide, and the instructions will make clear that the jury is not foreclosed by opinions of experts. The experts add to perspective, without governing decision. The law looks to the experts for input, and to the jury for outcome.

Id.

100. See *infra* text accompanying notes 106-09.

101. *THE INSANITY PLEA*, *supra* note 45, at 5-6.

102. *Id.* at 6 (emphasis in original).

According to the authors, such “humanistic concerns”¹⁰³ have two adverse consequences. First, jury decisions, as a result of compassion, are not based on legal rules or even medical facts, but on a sense of fairness; the authors maintain that presenting a jury with the need to consider an insanity plea necessarily leads to an unprincipled decision:

When a jury faces such a question, what often becomes a “satisfying” (at least to the jury) conclusion is not careful application of either legal definitions or psychiatric expertise. Rather, given all available information, attitudes, and insights, the jury determines what seems to them at the moment as *fair*—what, in essence, reflects the jury’s feeling that their decision provides balance to the competing claims.¹⁰⁴

The second adverse consequence is that recognizing the validity of the insanity plea undermines one’s sense of responsibility. By eliminating the insanity defense, Winslade and Ross maintain that society can “even contribute to an enduring sense of our own commitment to duty, allegiance to hope, and belief in the perfectibility of our own intentions.”¹⁰⁵

The argument that the insanity defense undermines the concept of personal responsibility is a complete inversion of the usual understanding of the significance of the defense that is given by standard texts. For example, Herbert Fingarette, in *The Meaning of Criminal Insanity*,¹⁰⁶ writes: “[W]here there is insanity, one may properly speak of irrationality. . . . [W]here rationality is lacking, responsibility status is lacking.”¹⁰⁷ Similarly, Abraham Goldstein writes in *The Insanity Defense*:¹⁰⁸

[T]he insanity defense can play a part in reinforcing the sense of obligation or responsibility. Its emphasis on whether an offender is sick or bad helps to keep alive the almost forgotten drama of individual responsibility. Its weight is felt through the tremendous appeal it holds for the popular imagination, as that imagination is gripped by a dramatic trial and as the public at large identifies with the man in the dock. In this way, it becomes a part of a complex of cultural forces that keep alive the moral lessons, and the myths, which are essential to the continued order of society.¹⁰⁹

Not only does the authors’ claim depart from the conventional view that the insanity defense contributes to the reinforcement of the concept of responsibility, but their argument also seems flawed both in its premises about the defense and in its assessment of how the jury operates. The discussion of empathy and identification with the dark impulses of the defendant does not describe the nature of the insanity defense or the process of reasoning undergone by jurors who are required to consider the defense. It seems, rather, that what Winslade and Ross describe is the operation of a defense based on provocation, which recognizes that human beings may in fact capitulate to strong emotions and lose control when they can and should exercise

103. *Id.* at 16.

104. *Id.* at 18 (emphasis in original).

105. *Id.* at 19–20.

106. H. FINGARETTE, *THE MEANING OF CRIMINAL INSANITY* (1972).

107. *Id.* at 182.

108. A. GOLDSTEIN, *THE INSANITY DEFENSE* (1967).

109. *Id.* at 224.

restraint and control.¹¹⁰ The insanity defense, on the other hand, does not create a situation in which the juror is expected to empathize with the emotional reaction of a defendant; instead, it involves a situation in which the defendant, because of mental illness, is so different from other persons that he is incapable of rational conduct and, as a consequence, cannot meet the standards established for responsibility that are requisites for blame and criminal guilt.¹¹¹

Another complaint made by the authors about the operation of the insanity defense is that the insanity plea leads the jury to base its verdict on a sense of fairness.¹¹² It is this exercise of the sense of fairness by the jury within the parameters of the excuse or defense, however, that provides the basis for the legitimacy of the insanity defense. This point was given as a ground for the insanity defense by the Court of Appeals for the District of Columbia in its decision in *United States v. Brawner*,¹¹³ in which the court, rejecting a "justly responsible" test, adopted an insanity defense following the Model Penal Code formulation.¹¹⁴ The *Brawner* majority observed:

It is the sense of justice propounded by those charged with making and declaring the law—legislatures and courts—that lays down the rule that persons without substantial capacity to know or control the act shall be excused. . . . There is wisdom in the view that a jury generally understands well enough that an instruction composed in flexible terms

110. See, e.g., HANDBOOK ON CRIMINAL LAW, *supra* note 64, § 76. LaFave and Scott describe the concept of reasonable provocation as follows:

It is sometimes stated that, in order to reduce an intentional killing to voluntary manslaughter, the provocation involved must be such as to cause a reasonable man to kill. Yet the reasonable man, however greatly provoked he may be, does not kill What is really meant by "reasonable provocation" is provocation which causes a reasonable man to lose his normal self-control; and, although a reasonable man who has thus lost control over himself would not kill, yet his homicidal reaction to provocation is at least understandable. Therefore, one who reacts to the provocation by killing his provoker should not be guilty of murder. But neither should he be guilty of no crime at all.

Id. at 573.

111. See J. FEINBERG, *What Is So Special About Mental Illness*, in DOING AND DESERVING 272-92 (1970). Professor Feinberg attempts to identify what there is about the insane person that sets him apart from other persons who are held responsible for their conduct. Feinberg concludes that the basis for differentiating the insane actor rests on the bases or the "why" of his actions:

[I]t is a matter not with the criminal's intentions, but with his underlying motivations—the basis of the appeal in his immediate goals or objectives. The first such difference is that the sick criminal's motives appear quite *unintelligible* to us. We sometimes express our puzzlement by saying that his crimes have no apparent motive at all. We cannot see any better than the criminal himself "what he gets out of it," and it overburdens our imaginative faculties to put ourselves in his shoes. We understand the avaricious, irascible, or jealous man's motives all too well, and we resent him for them. But where the crimes resist explanation in terms of ordinary motives, we hardly know what to resent. Here the old maxim "to understand all is to forgive all" seems to be turned on its ear. It is closer to the truth to say of mentally ill wrongdoers that to forgive is to despair of understanding.

. . . .

. . . We get closer to the heart of the matter, I think, if we say that the mentally ill criminal's motives are unintelligible because they are irrational—not just unreasonable, but *irrational*.

Id. at 284-85 (emphasis in original).

112. THE INSANITY PLEA, *supra* note 45, at 18.

113. 471 F.2d 969 (D.C. Cir. 1972).

114. The "justly responsible" test was recommended by the British Royal Commission on Capital Punishment. *Final Report*, Cmd. 8932 at 98 (1953), as an alternative to the Model Penal Code test, see MODEL PENAL CODE § 4.01 (Tent. Draft No. 4, 1955). It was also recommended in Chief Judge Bazelon's opinion in *United States v. Brawner*, 471 F.2d 969, 1010-39 (D.C. Cir. 1972) (Bazelon, J., concurring in part and dissenting in part). This test has been adopted by the Rhode Island Supreme Court. See *State v. Johnson*, 399 A.2d 469 (R.I. 1979).

gives it sufficient latitude so that, without disregarding the instruction, it can provide that application of the instruction which harmonizes with its sense of justice¹¹⁵

This fact, instead of undermining a sense of personal responsibility in the public, contributes to and reinforces that sense. The function of the insanity defense is recognized to be one of distinguishing "the responsible from the irresponsible," thus reinforcing the concept of responsibility in those who will be held to account for their conduct.¹¹⁶ The central significance of the insanity defense is the separation of nonblameworthy from blameworthy offenders. Thus, the defense of insanity has the purpose of maintaining the requisites of individual moral and legal responsibility by identifying those qualities which lead to moral and legal accountability. The insanity defense has as its very foundation the concept of individual responsibility as a prerequisite for criminal culpability and penal sanction.

B. Case Studies

While *The Insanity Plea* provides general argumentation for abolition of the insanity defense, the main body of the book consists of seven cases that the authors admit are not necessarily "representative of the insanity defense cases submitted to jurors throughout the United States," but were chosen because each "represents one aspect of the problems inherent in the insanity defense."¹¹⁷ Because the ultimate conclusions and recommendations of the authors rest primarily on the account and analysis given these cases, the authors' discussion of each case merits close scrutiny.

1. Dan White

The first case chosen is that of Dan White, who was charged with two counts of first degree murder under California law for the killing of the mayor and a city supervisor of San Francisco.¹¹⁸ White's trial resulted in a conviction for voluntary manslaughter on both counts.¹¹⁹ The opinion of Winslade and Ross is that "[t]he case of Dan White shows how psychiatrists play upon jurors' emotions by offering testimony that explains behavior in compassionate psychobiographical form and provides an excuse for reduced responsibility."¹²⁰

In one sense, the authors' choice of the case of Dan White as the first case in which to examine the deficiencies of the insanity plea is surprising, since White did not rely on the insanity defense but instead used a diminished capacity defense.¹²¹

115. 471 F.2d 969, 988 (D.C. Cir. 1972).

116. Kadish, *The Decline of Innocence*, 26 CAMBRIDGE L.J. 273, 287 (1968).

117. THE INSANITY PLEA, *supra* note 45, at 201.

118. *Id.* at 21-51. For a general account of this case, see *Ex-Official Guilty of Manslaughter in Slayings on Coast; 3,000 Protest*, N.Y. Times, May 22, 1979, at A1, col. 1 [hereinafter cited as *Ex-Official Guilty*].

119. THE INSANITY PLEA, *supra* note 45, at 25.

120. *Id.* at 201.

121. *Id.* at 26. The defense of diminished capacity or partial responsibility should be distinguished from the insanity defense. See HANDBOOK ON CRIMINAL LAW, *supra* note 64, § 43, at 326-31. LaFave and Scott observe that the two defenses should be differentiated in terms of their consequences:

It must be emphasized that the notion of partial responsibility is quite separate and distinct from the defense of insanity. If a successful insanity defense is interposed, the result is a finding of not guilty by reason of insanity and, usually, commitment of the defendant. By contrast, an appropriate showing of partial responsibility will

The defense of diminished capacity is recognized in only a minority of jurisdictions.¹²² It was broadly construed in California¹²³ until the White case, after which the California legislature attempted to eliminate the defense by statute.¹²⁴ In another sense, the authors' choice of this case is not surprising, since the case involved political assassination and is thus precisely the type of case that is most reported by

result in a finding of not guilty of the offense charged, although the circumstances will usually be such that conviction of some lesser offense is still possible. The ultimate result, then, is not commitment but rather a sentence of imprisonment following conviction of an offense carrying lesser penalties than the crime originally charged.

Id. § 43, at 326. Furthermore, where the two defenses have been recognized, their acceptance has reflected an understanding of fundamentally distinct theoretical bases for the two defenses. LaFave and Scott report:

[T]hose jurisdictions which have accepted the notion that evidence of an abnormal mental condition may be considered on the issue whether the defendant had the mental state required for the offense charged have typically done so by emphasizing the difference between partial responsibility and the insanity defense. Because the various tests for insanity as a defense do not of necessity require a determination of defendant's ability to have the specific mental state defined for the offense charged, there is no inconsistency in the conclusion that a defendant undeserving of a finding of not guilty by reason of insanity might nonetheless have lacked the mental state. For example, if such a defendant is charged with first degree murder, thus calling for the prosecution to prove that the killing was committed with premeditation and deliberation, evidence tending to show that the defendant did not premeditate or deliberate because of a mental abnormality remains most relevant.

Id. § 43, at 327.

122. See Annot., 22 A.L.R.3d 1228 (1968) (providing a compilation of case and statutory law in which the defense of diminished capacity has been recognized). See also MODEL PENAL CODE § 210.3 comment (1980):

Very few jurisdictions allow mental disease or defect to reduce intentional homicide to manslaughter. Traditionally, such mitigation arises only from the rule of provocation. As the earlier discussion makes clear, provocation has been a predominantly objective determination It seeks to identify cases of intentional homicide where the situation is as much to blame as the actor. Recognizing diminished responsibility as an alternative ground for reducing murder to manslaughter undermines the scheme. Unlike provocation, diminished responsibility is entirely subjective in character It recognizes the defendant's own mental disorder or emotional instability as a basis for partially excusing his conduct. This position undoubtedly achieves a closer relation between criminal liability and moral guilt But this approach has its costs. By evaluating the abnormal individual on his own terms, it decreases the incentives for him to behave as if he were normal And the factors that call for mitigation under this doctrine are the very aspects of an individual's personality that makes us fearful of his future conduct. In short, diminished responsibility brings formal guilt more closely into line with moral blameworthiness, but only at the cost of driving a wedge between dangerousness and social control.

123. Under the California diminished capacity defense, two distinct grounds were developed for establishing the defense. The first, which is the sole ground in most other states that recognize the defense, is that psychological evidence is admissible to establish that the defendant lacked capacity, as a result of mental illness, to maintain a requisite mental state. See *People v. Wells*, 33 Cal. 2d 330, 202 P.2d 53 (1949); *People v. Gorshen*, 51 Cal. 2d 716, 336 P.2d 492 (1959), *overruled*, *People v. Wetmore*, 22 Cal. 3d 318, 583 P.2d 1308, 149 Cal. Rptr. 265 (1978). In *People v. Conley*, 64 Cal. 2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966), *overruled*, *People v. Wetmore*, 22 Cal. 3d 318, 583 P.2d 1308, 149 Cal. Rptr. 265 (1978), the California Supreme Court held evidence of impairment of the defendant's mental capacity admissible to negate any particular state of mind. A second ground, unique to California, provided that evidence of mental disorder was admissible to show lack of a culpable mental state by showing that the defendant lacked full appreciation of the moral significance of his conduct. In *Conley* the California court held, "A person who intentionally kills may be incapable of harboring malice aforethought because of a mental disease, defect, or intoxication, and in such case his killing, unless justified or excused, is voluntary manslaughter." 64 Cal. 2d 310, 318, 411 P.2d 911, 916, 49 Cal. Rptr. 815, 820 (1966), *overruled*, *People v. Wetmore*, 22 Cal. 3d 318, 583 P.2d 1308, 149 Cal. Rptr. 265 (1978). See also *People v. Wolf*, 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964). The *Wolf* court recognized the relevance of "the quantum of personal turpitude of the offenders" as an issue raised by evidence of mental disorder. The court concluded, "In the case at bench there is no question that the defendant had the intent to kill; but the mental infirmity of this defendant presents a very serious problem as to the quantum of his personal turpitude and depravity as inherently related to the degree of the murder." *Id.* at 820, 394 P.2d at 975, 40 Cal. Rptr. at 287.

124. CAL. PENAL CODE § 188 (West Supp. 1983) provides:

When it is shown that the killing resulted from the intentional doing of an act with express or implied malice as defined above, no other mental state need be shown to establish the mental state of malice aforethought. Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite such awareness is . . . included within the definition of malice.

the media and that, the research studies show, leads to the greatest public hostility to the defense and produces erroneous public opinion about the incidence and significance of the defense.¹²⁵ The verdict in the White case was viewed by some as both evidence of jury prejudice and a reflection of homophobia directed toward one of the victims, who was a prominent public figure in the San Francisco homosexual community.¹²⁶ The special quality of this public opposition and the extreme reaction of the public in protest demonstrations¹²⁷ suggest that this is not the best case with which to dispassionately evaluate the insanity defense.

Winslade and Ross contend that the verdict in the Dan White case was the result of two factors: the jury's empathy with the defendant¹²⁸ and the psychiatric expert witnesses' attribution of crime to psychological forces.¹²⁹ The authors assert:

[W]hat seems most likely to explain the jury's surprising verdict is that they found Dan White an extremely sympathetic figure, and not the least because he was so extraordinarily American in his simplistic views of what the world was like. . . . It is impossible to believe that twelve ordinary jurors would have refused to find White guilty of either first- or second-degree murder if they had not had the psychiatric "scientific" explanation to fall back on.¹³⁰

The jury was presented with a case in which it was asked, under the law then existing in California, whether the defendant was guilty of murder. Murder was defined as "[t]he unlawful killing of a human being with malice aforethought."¹³¹ If the killing was a "willful, deliberate, and premeditated killing," it would be first degree murder; otherwise it would be second degree murder.¹³² Both degrees of murder required "malice" manifested by "a deliberate intention unlawfully to take away the life of a fellow creature."¹³³ Moreover, by judicial construction, "malice" required that the defendant have an ability "to comprehend his duty to govern his actions in accord with the duty imposed by law."¹³⁴ The diminished capacity defense required that the jury consider evidence of mental disorder as possibly negating the capacity to deliberate and to premeditate, and if the jurors found that this capacity was lacking, they were precluded from finding first degree murder. In addition, the jury was required to determine whether the evidence showed that the mental disorder prevented the defendant from having the capacity to act with malice, and if the jurors found that this capacity was lacking, they were precluded from entering a verdict of second degree murder.¹³⁵

125. See *supra* text accompanying notes 40-44.

126. See *Ex-Official Guilty*, *supra* note 118, at A1, col. 1. It was reported, "Earlier, Harry Britt, a homosexual appointed by Mayor Feinstein to succeed Mr. Milk, said, 'This insane jury has legitimized the immorality of this killer. Every gay will know that this man's act represented intense homophobia.'" *Id.* at D17, col. 2.

127. *Id.* at A1, col. 1, reporting, "Within an hour after the verdict was announced, an angry mob of about 3,000 demonstrators marched to City Hall, where they surged against the front doors, breaking panes of glass."

128. THE INSANITY DEFENSE, *supra* note 45, at 44-50.

129. *Id.* at 44-48.

130. *Id.* at 50.

131. CAL. PENAL CODE § 187 (West 1970).

132. *Id.* § 189.

133. *Id.* § 188.

134. *People v. Conley*, 64 Cal. 2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966), *overruled*, *People v. Wetmore*, 22 Cal. 3d 318, 583 P.2d 1308, 149 Cal. Rptr. 265 (1978).

135. See *supra* note 123 and accompanying text.

As Winslade and Ross correctly report, evidence from a number of prominent psychiatric witnesses demonstrated that the defendant was mentally disordered—that the defendant suffered from depression.¹³⁶ For example, Dr. Donald Lunde, a professor of psychiatry and a lecturer in law at Stanford University, testified: “In Mr. White’s case, he not only did not premeditate or deliberate these killings, but as a result of his mental condition, he was not capable of any kind of mature, meaningful reflection [at the time of the killings].”¹³⁷ However, as reported in *The New York Times* (but not mentioned by Winslade and Ross), the jury deliberated on its verdict for thirty-six hours during six days.¹³⁸ There does not seem to be any reason to doubt that the jury considered both the law and evidence in the case before reaching its verdict. Rather than ascribing the jury’s decision merely to empathy or undue deference to psychiatric experts, one should consider the possibility that the jury reached its verdict by carefully considering all the evidence. The verdict was surely controversial, but it was not clearly erroneous given the law and the evidence.

Winslade and Ross fail to mention one important fact in their discussion of the White case: first degree murder in California carried a possible sentence of death.¹³⁹ This fact may have influenced the jury, and it seems to have influenced the California courts in developing the doctrine of diminished capacity. In the White case, the prosecutor sought the death penalty.¹⁴⁰ Therefore, if one is seeking to explain the jury’s verdict on some ground other than the law and evidence, a likely ground is that the jury believed that the death penalty was too harsh a penalty for the killings because of the mental and emotional state of the defendant.

2. Prosenjit Poddar

The second illustrative case is that of Prosenjit Poddar, who was charged with the murder of Tatiana (Tanya) Tarasoff.¹⁴¹ Poddar pleaded not guilty by reason of insanity. The jury, however, returned a verdict of guilty of second degree murder and found the defendant sane at the time of the commission of the crime.¹⁴² The facts, which are extensively reviewed by Winslade and Ross and reported in two court opinions,¹⁴³ are that Poddar, a college student from Bengal, India, fell in love with and became obsessed by the deceased, whom he eventually shot when she rebuffed

136. THE INSANITY PLEA, *supra* note 45, at 46–47.

137. *Id.* at 46.

138. *Ex-Official Guilty*, *supra* note 118, at D17, col. 2.

139. CAL. PENAL CODE § 190 (West 1970) provides that murder of the first degree is punishable by death when special enumerated circumstances exist.

140. See *Ex-Official Guilty*, *supra* note 118, at D17, col. 4, where it was reported:

The prosecutor asked for a finding that the killings constituted first-degree murder with “special circumstances,” which would permit the death penalty under terms of a capital punishment law adopted in a statewide referendum last November.

The “special circumstances” cited were that Mayor Moscone had been killed to block an official action—naming another person to the seat Mr. White had resigned but wanted back—and that more than one person had been killed.

141. THE INSANITY PLEA, *supra* note 45, at 52–73.

142. See *People v. Poddar*, 10 Cal. 3d 750, 753, 518 P.2d 342, 344, 111 Cal. Rptr. 910, 912 (1974).

143. *Id.*; *People v. Poddar*, 103 Cal. Rptr. 84 (Cal. Ct. App. 1972), *vacated*, 10 Cal. 3d 750, 518 P.2d 342, 111 Cal. Rptr. 910 (1974).

his advances. The defense produced three psychiatrists and one psychologist who testified that the defendant was a paranoid schizophrenic who could not have harbored malice aforethought at the time of the killing, and the prosecution produced a court-appointed psychiatrist who testified that the defendant was merely schizoid and could harbor the requisite mental state for murder.¹⁴⁴ The defendant appealed and obtained a reversal of his conviction on the ground that the trial court erred in refusing to give a requested instruction relating the effect of diminished capacity to implied malice, which was an element of second degree murder.¹⁴⁵ Thus, this case is ultimately one of diminished capacity under California law and not an insanity defense case, at least in its appellate treatment.

The use of this case by the authors to examine the operation and claimed deficiencies of the insanity defense seems less motivated by a desire to instruct the reader than by a desire to provide a rhetorical argument on the need to fix guilt and responsibility for harm. Winslade and Ross assert, "The judicial system intervened in this case to try to improve upon the trial court's allocation of guilt and responsibility. Their efforts were rough and, in the long run, counterproductive, because no one was found guilty and no one was held responsible."¹⁴⁶ The authors' ultimate assessment is that "[t]he Poddar case shows the ability of the judiciary to use technical points of law to overturn jury verdicts when their assessment of the defendant's mental state differs from the jury's opinion."¹⁴⁷

The authors' rhetorical strategy merits scrutiny. First, this case does not support the claim that the insanity defense establishes a means for relieving guilty persons of responsibility, since the jury in fact rejected the insanity defense. Second, the assertion that this case reveals judicial efforts to displace the jury's findings of responsibility is false¹⁴⁸ since the basis of the reversal was not a finding of a clearly erroneous jury verdict, but an error on the part of the trial court in failing to give a proper instruction.

Like the Dan White case, *Poddar* involved legal issues peculiar to the law of diminished capacity in California at the time of the *Poddar* trial. One need only examine the text of the opinion of the California Supreme Court to determine the precise ground of the reversal. The court reasoned as follows:

Our inquiry in the instant case is particularly directed to the propriety of the jury's finding of implied malice in light of diminished capacity. . . .

. . . The question of the existence of a diminished capacity was clearly a disputed factual issue and defendant was entitled to have the jury instructed on its applicability to the issue of implied malice. The failure to give instructions thereon would thus have been error. . . .

. . .

144. 10 Cal. 3d 750, 754, 518 P.2d 342, 345, 111 Cal. Rptr. 910, 913 (1974).

145. *Id.* at 753, 518 P.2d at 344, 111 Cal. Rptr. at 912.

146. THE INSANITY PLEA, *supra* note 45, at 72.

147. *Id.* at 201.

148. *Id.* at 70. The claim is that "sympathy and empathy for Poddar may well have led [the court] to make this unlikely reversal." *Id.*

. . . The vice of the instructions, however, is that they stopped short of being full and complete and failed to advise as to the precise finding or findings, after a threshold finding of a diminished capacity, which must be made prior to a determination that defendant acted with malice aforethought.¹⁴⁹

The court concluded:

We have little difficulty in concluding that the error was prejudicial. Defendant's whole defense was, essentially, his failure to have entertained mental intents which were necessary elements of the crimes charged or included in the charges. Evidence was introduced which was almost overwhelming that by reason of diminished capacity defendant lacked malice aforethought. Under the facts of the instant case we conclude that in the absence of the error it is reasonably probable that a result more favorable to defendant would have been reached.¹⁵⁰

While Winslade and Ross could have developed a principled critique of diminished capacity, they chose not to do so.¹⁵¹ Rather, they criticize the court's decision as resting on "an unlikely technical issue."¹⁵² More significant than the rhetorical devices adopted is the revelation of the authors' basic premise underlying not only their comments on *Poddar*, but also their view of the insanity defense. Winslade and Ross rhetorically ask, "Is the question of Poddar's state of mind really relevant to his guilt?"¹⁵³ The authors' notion of guilt is one of causal responsibility; it is not the concept of guilt that entails blame and that has come to be a basic requisite for criminal liability in Anglo-American law.¹⁵⁴ Winslade and Ross seem obsessed with fixing guilt or responsibility for criminal harm, and this obsession leads them to view subsequent litigation stemming from *Poddar*, in which the Tarasoff family sought civil relief from police and from physicians treating Poddar,¹⁵⁵ as a "quest for legal responsibility in the murder of Tanya Tarasoff."¹⁵⁶ The authors' despair in finding that no legal authority imposed penal or civil penalties on anyone related to the case leads them to complain: "No one was found guilty, no one was found responsible, and no one was found to have failed in any duty they might have had to prevent Tanya's sad death."¹⁵⁷ Their frustration is also expressed in the conclusion: "This was a *murder* [that] ends by being a death with no reason and no responsibility."¹⁵⁸

149. 10 Cal. 3d 750, 758-59, 518 P.2d 342, 348-49, 111 Cal. Rptr. 910, 916-17 (1974).

150. *Id.* at 761, 518 P.2d at 350, 111 Cal. Rptr. at 918.

151. See *supra* text accompanying note 117. See also Johnson, *Foreword: The Accidental Decision and How It Happens*, 65 CALIF. L. REV. 231, 239-43 (1977); Morse, *Diminished Capacity: A Moral and Legal Conundrum*, 2 INT'L J. L. & PSYCHOLOGY 271, 281-83 (1979).

152. THE INSANITY PLEA, *supra* note 45, at 70.

153. *Id.* at 71.

154. See *Durham v. United States*, 214 F.2d 862, 876 (D.C. Cir. 1954) (Chief Judge Bazelon observed, "Our collective conscience does not allow punishment where it cannot impose blame.")

155. See *Tarasoff v. Regents of Univ. of Cal.*, 13 Cal. 3d 177, 529 P.2d 553, 118 Cal. Rptr. 129 (1974), *opinion on rehearing*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (holding that university psychotherapists could be found liable for failing to warn a person threatened and subsequently murdered by one of the psychotherapists' patients). See generally Fleming & Maximou, *The Patient or His Victim: The Therapist's Dilemma*, 62 CALIF. L. REV. 1025 (1974); Stone, *The Tarasoff Decisions: Suing Psychotherapists to Safeguard Society*, 90 HARV. L. REV. 358 (1976); Wexler, *Therapists and Third Parties: The Victimological Virtues of Tarasoff*, 2 INT'L J. L. & PSYCHIATRY 1 (1979).

156. THE INSANITY PLEA, *supra* note 45, at 69.

157. *Id.*

158. *Id.* (emphasis added).

The position taken in *The Insanity Plea* reflects a profound misunderstanding of criminal law. Certainly there was a killing, but there was no *murder* unless the elements established by the penal code were proved. In California this required proof of malice.¹⁵⁹ Without malice there simply was no murder. Second, it is not the purpose of the law to assign guilt or responsibility on someone in every case of criminal harm, nor is it the objective of the law to impose a penalty on someone for every death, or even for every death that is a result of a killing. The criminal law is reserved for the imposition of penal sanctions on the culpable. The existence of stated requisite elements of offenses and the recognition of a series of explicit defenses that serve to justify or excuse a killing are meant to restrict the finding of criminal guilt and the imposition of penal sanctions to those who are responsible, in the sense of being culpable, according to the criteria established by law. The fallacy of the authors' argument is made clearest in their discussion of the civil cases that led the California courts to establish a duty on the part of therapists to warn potential victims of dangerous patients.¹⁶⁰ Winslade and Ross express dismay that the civil actions led to an out-of-court damage settlement so that "even then, pronouncement of guilt and apportionment of responsibility was never made."¹⁶¹ Certainly it is a strange view that would consider the lack of a court judgment for damages arising from a duty to warn potential victims in this circumstance to be a failure of the legal system to pronounce guilt and apportion responsibility.

Last, the authors' effort to employ *Poddar* as an occasion to condemn the insanity defense is totally unsupported by the facts of the case. Winslade and Ross conclude that the *Poddar* case is one in which "[t]he jury found him sane; the Supreme Court [of California] seemed to think him insane."¹⁶² This mischaracterization of the case is revealed in the earlier discussion of the court's opinion, which shows that the court's concern was clearly centered on the issue of diminished capacity and that the basis for the appeal was a claim of trial court error in the instruction of the jury.¹⁶³

3. *Leonard Smith*

The third case analyzed by Winslade and Ross concerned the killing of Lyman Bostock by Leonard Smith.¹⁶⁴ It is the first case in the book to directly and fully present the issue of the insanity defense. Unfortunately, no legal opinions were generated by this case, and the only readily available public record is newspaper reports of the killing.¹⁶⁵ One is compelled, therefore, to accept the authors' account of the case. Nevertheless, a brief consideration of the authors' evaluation of the facts they report is valuable since this evaluation is used to support their general arguments against the insanity defense.

159. CAL. PENAL CODE §§ 187-88 (West 1970).

160. THE INSANITY PLEA, *supra* note 45, at 68-73.

161. *Id.* at 71.

162. *Id.* at 73.

163. See *supra* text accompanying notes 149-50.

164. THE INSANITY PLEA, *supra* note 45, at 74-102.

165. See *Bostock Is Shot to Death in Gary*, Chicago Tribune, Sept. 24, 1978, at 1, col. 2; *Baseball Star Slain; Man Held*, Chicago Tribune, Sept. 25, 1978, at 1, col. 4 & 10, col. 4.

Leonard Smith was charged with killing Lyman Bostock, a well-known baseball player. Smith did not personally know Bostock, but Smith observed Bostock in the company of Smith's wife at the time of the killing.¹⁶⁶ Smith was estranged from his wife, but was in the process of seeking a reconciliation. He was disappointed by failure not only in marriage but also in employment, and he believed that he was a victim of racial prejudice.¹⁶⁷ Smith's first trial failed to result in a unanimous verdict, but at a second trial Smith was found not guilty by reason of insanity.¹⁶⁸ According to Winslade and Ross, two psychiatrists testified at the first trial; one expressed doubts about the defendant's sanity, and the other testified that the defendant was sane.¹⁶⁹ At the second trial an additional expert, a psychologist, testified on the basis of interviews and tests that Smith was insane.¹⁷⁰ The authors offer snippets of the trial transcript comprising the judgments that the defendant had "gradually increasing neurotic difficulties" and that "repeated failures . . . slowly eroded his functions."¹⁷¹

Winslade and Ross give two reasons why, in their opinion, the insanity defense was successful in Smith's case. The first is based on the assertion that the jury empathized with Smith. To support this contention, the authors first claim that the jury was touched by the "hard luck story" of the defendant, while it felt alienated from the success of the deceased. "The jury could not very well identify with Bostock, but they could with Leonard Smith."¹⁷² This analysis of the way average jurors think and feel is dubious at best; no evidence suggests that the average American identifies with a person who is a failure and kills rather than with a person who is successful and is killed. Such a dynamic is certainly not the apparent response of the average citizen to Mark David Chapman, the killer of John Lennon, or even to John Hinckley, who attempted to kill President Reagan. The second basis for the claimed empathy is the acquittal itself: "The first jury's position suggests the incipient sympathy for Leonard Smith. The second jury's verdict confirms it."¹⁷³ The fallacy of this reasoning is clear: Winslade and Ross claim that one of the reasons why the insanity defense is successful is that there is an improper process of empathizing with the defendant by the jury rather than a determination of guilt or innocence based on the principles provided in law, and the proof of this assertion is that the defense of insanity is successful. One could hardly hope to find a better example of a circular argument.

The second reason for the success of the insanity defense in the Smith case, according to Winslade and Ross, is the nature of the testimony and evidence pre-

166. THE INSANITY PLEA, *supra* note 45, at 92-93.

167. *Id.* at 83-93.

168. *Id.* at 75-76.

169. *Id.* at 75-76. The actual diagnoses or bases of the psychiatrists' opinions were not given. Rather, they testified only about the ultimate issue—a practice currently subject to criticism. See, e.g., *American Psychiatric Association Statement on the Insanity Defense*, *supra* note 14, at 683.

170. THE INSANITY PLEA, *supra* note 45, at 75-76.

171. *Id.* at 76.

172. *Id.* at 76-77.

173. *Id.* at 100.

sented by the psychologist at the second trial.¹⁷⁴ The authors claim that the witness "had shown the jurors an objective and apparently scientific guide to Leonard's state of mind, to an assessment of mental illness and lack of capacity, and to a verdict of not responsible by reason of insanity."¹⁷⁵ The verdict is again the proof of the claim. Winslade and Ross reason: "The first trial jury was deadlocked, ten to two *for conviction*. The second jury voted twelve to zero for acquittal. The major difference was a single psychologist who testified that Smith was incapable, because of mental illness, of forming the required intent for murder."¹⁷⁶ This reasoning ignores the fact that the psychologist's testimony was not the only variable in the two trials. Two different juries were undoubtedly capable of different judgments about the entire body of evidence in the case; the authors' analysis ignores the possibility of a different jury dynamic in the process of deliberation in the two trials. The analysis also suggests that the jurors simply deferred to one expert witness, ignoring all other evidence—a judgment contrary to the findings of empirical studies of jury deliberations in trials involving the defense of insanity.¹⁷⁷

Winslade and Ross assess the Smith case as follows:

This case is a clear miscarriage of justice and abuse of the insanity plea. It was made possible by the attorney who pursued it, the psychotherapists who participated in it, and the jury who bought the sorry bill of goods. The therapist in this case appears to be the primary perpetrator of the outrageous acquittal, but in fact he is merely someone used by the legal system to rationalize and dignify verdicts and sentences that otherwise are not only unjust but unjustifiable.¹⁷⁸

The implications of this judgment are not limited to the impropriety of the insanity defense; it is an indictment of the jury system itself. The account Winslade and Ross give of the Smith case is simply insufficient to support their condemnation of the insanity defense, the asserted lack of conscientiousness on the part of the jury, or the impropriety of the verdict. Most certainly the authors' parting comment on the Smith case goes beyond any fair reading of the case even by their account: "In effect, the criminal justice system told Leonard Smith he could have one almost-free murder to make up for his sad life. That was no bargain—and no justice—for anyone."¹⁷⁹ The rhetorical style of this discourse cannot substitute for principled analysis, empirical study, or dispassionate evaluation. One is compelled to conclude that Winslade and Ross seek not to instruct, but to persuade.

4. *Tex Watson*

The fourth case discussed by Winslade and Ross is that of Charles "Tex" Watson,¹⁸⁰ who was convicted of seven counts of first degree murder and one count

174. *Id.* at 97 ("He had tests, he had test scores, he had scientific profiles. It was just a matter of demonstrating psychological facts.").

175. *Id.* at 99.

176. *Id.* at 100 (emphasis in original).

177. See *supra* notes 53–55 and accompanying text.

178. *THE INSANITY PLEA*, *supra* note 45, at 100–01.

179. *Id.* at 102.

180. *Id.* at 103–32.

of conspiracy to commit murder¹⁸¹ growing out of the Tate and LaBianca slayings, popularly known as the Manson murders.¹⁸² This case is used by Winslade and Ross chiefly to criticize the nature and presentation of psychiatric evidence at trial. One important fact not mentioned in the book is that this proceeding, which is described at length, included a separate sanity hearing under a bifurcated trial procedure mandated under California law.¹⁸³ This procedure required first a determination of guilt, and then separate hearings on sanity and penalty.¹⁸⁴ Therefore, the authors' suggestion that the psychiatric evidence was disregarded by the jury in its determination of guilt is misleading. Winslade and Ross assert, "[T]he juries returned verdicts containing not even the slightest suggestion that they thought these murderers were insane All the defendants were found guilty";¹⁸⁵ and claim "[A court-appointed psychiatrist] gave the jury a set of reasons and motivations that they could understand and that they could use to support a guilty verdict."¹⁸⁶ Actually, the jurors already had concluded the guilt phase of the trial before they heard the psychiatric testimony related to the insanity defense.

While the main focus of the discussion of the Watson case in *The Insanity Plea* is a critique of the psychiatric expert testimony, several other unsupported or misleading points are suggested. In almost symmetrical opposition to their characterization of the process at work in the Smith case, the authors suggest that the jury's guilty verdict and rejection of the insanity plea in the Watson case is explained, in part, by lack of empathy with or sympathy for the defendant: "The jury had to make some sense both of the murders and murderers, but how was it possible to understand something so horrendous? The choices seemed limited: either these young people *were* crazy . . . or they were monsters . . . and not at all like other people."¹⁸⁷ Fear is the authors' ultimate explanation for the verdicts in the case: "[Watson] was dangerous and they gave him the death sentence. Was he crazy? Did it really matter to the jury? To society? No jury would have sent him anywhere but death row. They didn't want to ever see him on the streets again."¹⁸⁸ Winslade and Ross refuse to consider the possibility that maybe, just maybe, the jury considered the law and evidence in the case and reached a just and justified verdict.

181. See *Watson Convicted of Tate Murders; Faces Sanity Trial*, N.Y. Times, Oct. 13, 1971, at 17, col. 1 [hereinafter cited as *Watson Convicted*].

182. See generally V. BUGLIOSI & C. GENTRY, *HELTER SKELTER: THE TRUE STORY OF THE MANSON MURDERS* (1977) [hereinafter cited as *HELTER SKELTER*]; G. BISHOP, *WITNESS TO EVIL: THE INSIDE STORY OF THE TATE/LABIANCA MURDER TRIAL* (1971); E. SANDERS, *THE FAMILY* (1972). A useful collection of papers presenting an examination of the philosophical implications of this case, significant for consideration of the justification for the insanity defense, is presented in *THE MANSON MURDERS: A PHILOSOPHICAL INQUIRY* (D. Cooper ed. 1974).

183. CAL. PENAL CODE § 1026 (West 1970).

184. *Id.* *Watson Convicted*, *supra* note 181, at 17, col. 1, reported, "The six-man, six-woman jury that convicted Watson deliberated for five days He still faces a sanity trial and if ruled sane, a trial to determine whether the penalty should be life imprisonment or death." See *HELTER SKELTER*, *supra* note 182, at 463, where the prosecuting attorney reports, "Charles 'Tex' Watson went on trial in August 1971 The trial had three possible phases—guilt, sanity, and penalty—each of which presented its own problems."

185. *THE INSANITY PLEA*, *supra* note 45, at 105.

186. *Id.* at 114.

187. *Id.* at 106 (emphasis in original).

188. *Id.* at 132.

Two other red herrings are tossed into the discussion of the Watson case. Winslade and Ross suggest that the character of the crime, rather than the capacities of the defendant, can be determinative of insanity and that the bizarre quality of the killings in the Watson case indicates that a finding of insanity was rejected by the jury for deep-seated psychological reasons such as fear. The authors remark, "The stories of the murders gave sufficient detail to suggest that, if any murder could be characterized as an act of insanity, then surely these could."¹⁸⁹ If a showing of a bizarre manner of performing a killing was the basis for an insanity defense, one could expect the most rational and calculating person to go free since he would most assuredly develop a plan of killing that could meet the standards of insane crime. The insanity defense, however, is concerned with the culpability of the actor, not the characteristics of his crime, except as these characteristics provide a basis for inference about his capacities.

A second misleading suggestion made in *The Insanity Plea* is that drug use provides a sufficient basis for the insanity defense. Winslade and Ross write, "But when a vast amount of drug use was reported in the Manson and Watson trials, the jury forgot that drugs make you crazy and did not for a second believe that drug craziness was a defense."¹⁹⁰ Of course, "drug craziness" is not a defense. Actual drug intoxication at the time of an offense may negate a requisite mental state, and excessive use of drugs may bring about insanity by producing brain damage, but in the latter case the legal rules concerning the insanity defense govern.¹⁹¹

The principal use of the Watson trial in criticizing the insanity defense is for "demonstrat[ing] the disarray, vagueness, and confused, conflicting opinions of psychiatrists."¹⁹² Here Winslade and Ross make a number of valid points. They identify three principal reasons for the conflict in psychiatric evidence. First, the "adversary aspect of criminal trials accounts for some of the disparity in evidence given by expert psychiatric witnesses."¹⁹³ This certainly is true, but this objection is directed at the adversarial system, not the nature of psychiatric testimony. As Alan Stone, professor of law and psychiatry at Harvard University and former president of the American Psychiatric Association, has noted:

Whatever the scientific status of psychiatry may be and whatever the ethical status of its practitioners may be, the public has to expect that psychiatrists, like all other expert witnesses, have been selected by lawyers who are advocates. Furthermore, in all important cases, the lawyer will have screened and then coached the psychiatrist on what to say and how to say it. *To object to the contradictory testimony of psychiatrists is to object to the adversarial system of justice.*¹⁹⁴

189. *Id.* at 105.

190. *Id.*

191. HANDBOOK ON CRIMINAL LAW, *supra* note 64, § 45, at 341-51.

192. THE INSANITY PLEA, *supra* note 45, at 201.

193. *Id.* at 121.

194. Stone, *supra* note 12, at 638 (emphasis added). The alternative to adversarial presentation of psychiatric testimony is to provide for a court-appointed expert; this would, however, have the likely effect of usurping the fact-finding responsibility of judge or jury. See Prelinger, *supra* note 12, at 238-39. Prelinger evaluates an approach using court-appointed psychiatric expert witnesses as follows:

It has been suggested that "impartial," perhaps court-appointed mental-health experts, either individually or as

Winslade and Ross do not limit their explanation of the conflicts in psychiatric testimony to the effect of the adversarial system. They maintain that these conflicts are inevitable because between law and psychiatry there is "an absolute difference in assumptions or in basic beliefs about human functioning."¹⁹⁵ In addition, they observe, "Psychotherapeutic expert witnesses are members of a profession that has no generally agreed upon, scientifically based standard of knowledge with respect to the issues of insanity and legal responsibility."¹⁹⁶ Finally, Winslade and Ross argue that, beyond the inherent inadequacies of psychiatric evidence, it is impossible to make an assessment of a past state of mind; concerning the Watson case, they maintain: "No one there knew nor had any way of knowing what his state of mind had been on the night of the murders. We simply don't know enough to uncover that kind of knowledge."¹⁹⁷ Ultimately, Winslade and Ross argue that the criminal trial would be improved by eliminating psychiatric testimony: "Tex Watson, the jury, and the public would all have been better served if the [psychiatric] experts had declined to testify."¹⁹⁸

The authors' argument, particularly their objection to psychiatric opinion as conclusive proof of a past state of mind, has some strength. Psychiatric testimony should be offered as relevant evidence to be considered by the jury, along with all other evidence presented as a basis for *the jurors'* factual determination of the defendant's capacity and responsibility. Moreover, the authors' critique of the subjective quality of unsupported opinion testimony by some psychiatric witnesses has some merit. The proper response, however, is reform of the rules controlling the presentation of evidence, not the elimination of psychiatric testimony.¹⁹⁹ Every legal formulation of the insanity test requires as one of its elements a showing of mental disease or defect.²⁰⁰ Psychiatrists are by definition experts in the diagnosis of the existence of mental disease, and it is absurd to think that one could maintain the

specially constituted boards, possibly augmented by a member chosen by the defendant, might evaluate the accused and present their findings for consideration of judge or juries. This proposal carries the risk of such consultants in actuality usurping the functions of judge or jury and thus in effect deciding the case.

Id.

195. *THE INSANITY PLEA*, *supra* note 45, at 123.

196. *Id.* at 108.

197. *Id.* at 129.

198. *Id.* at 131.

199. See Prelinger, *supra* note 12. Prelinger suggests that certain evidence is less likely to involve opinion and give rise to conflicts among psychiatric witnesses:

[I]t is obvious that material of an "objective" nature carries most weight. This includes, predominantly, easily verified life-historical data, especially those reflecting a history of pathological conduct. Psychological test results, particularly if derived from well-known, standardized instruments, similarly are less likely to be so intensely disputed during cross-examination as more remote and indirectly derived inferences and interpretations may be.

Id. at 239. Prelinger then suggests restrictions on the admission of psychiatric testimony: "The role of expert witness would be redefined as that of a provider of facts, observations, and qualified inference and opinion." *Id.* at 240.

200. The *M'Naghten* test requires as an element of the defense of insanity that "the party accused was labouring under such a defect of reason, from disease of the mind." *M'Naghten's Case*, 8 Eng. Rep. 718, 722 (H.L. 1843). The *Durham* product test provided in part, "if his unlawful act was the product of mental disease or defect." *Durham v. United States*, 214 F.2d 862, 874-75 (D.C. Cir. 1954), *overruled*, *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972). The Model Penal Code test includes the qualification, "[i]f at the time of such conduct as a result of mental disease or defect." MODEL PENAL CODE § 4.01(1) (Proposed Official Draft 1962).

insanity defense and eliminate psychiatric testimony. As Alan Stone has observed, "[I]f there is to be an insanity defense, there must be psychiatric testimony or some equivalent" ²⁰¹

5. Robert Torsney

The fifth case presented in *The Insanity Plea* is that of Robert Torsney,²⁰² an on-duty New York City police officer at the time of the alleged offense, who was charged with second degree murder for the killing of a black youth.²⁰³ Evidence showed that Torsney fired his weapon without provocation or justification at point-blank range.²⁰⁴ The defendant admitted the killing, but contended that he was not criminally responsible.²⁰⁵ Psychiatric witnesses presented by the prosecution maintained that Torsney suffered from hysterical tendencies, but was not psychotic.²⁰⁶ Defense witnesses claimed that the defendant was neurotic, possibly had brain damage, and suffered from a psychomotor seizure caused by a rare form of epilepsy called "Automatism of Penfield."²⁰⁷ The jury found Torsney not guilty by reason of insanity. Winslade and Ross correctly report that the killing and the jury's verdict met with criticism from the public, which saw implicit overtones of racial bias in the killing and acquittal.²⁰⁸

The authors' critique of the operation of the insanity defense and the nature and the quality of psychiatric testimony in *Torsney* parallels their discussion of the other cases in *The Insanity Plea*. The focus of their analysis of the *Torsney* case is the post-acquittal disposition of the defendant.

Winslade and Ross report that Torsney was committed to a psychiatric evaluation center after his acquittal and then transferred to a mental hospital for diagnosis and treatment.²⁰⁹ Within four months, the treating physicians found that Torsney was not dangerous and not mentally ill and recommended that he be released.²¹⁰ After a series of reviews by a special release committee, an independent review panel, and the Commissioner of Mental Health, and a full evidentiary hearing before a trial court lasting for nine days, the court ordered Torsney released on the conditions that he not carry a gun, not continue as a police officer, and continue treatment as an outpatient.²¹¹ The appellate division reversed the release order, finding that the evidence failed to establish that Torsney was ready for conditional release without danger to

201. Stone, *supra* note 12, at 640.

202. THE INSANITY PLEA, *supra* note 45, at 133-58.

203. See *In re Torsney*, 47 N.Y.2d 667, 394 N.E.2d 262, 420 N.Y.S.2d 192, *rev'g* 66 A.D.2d 281, 412 N.Y.S.2d 914 (1979).

204. *Id.* at 686, 394 N.E.2d at 273, 420 N.Y.S.2d at 204.

205. *Id.*

206. *Id.* at 677, 394 N.E.2d at 268, 420 N.Y.S.2d at 198.

207. *Id.* at 691, 394 N.E.2d at 276, 420 N.Y.S.2d at 207; see THE INSANITY PLEA, *supra* note 45, at 140-41.

208. THE INSANITY PLEA, *supra* note 45, at 136, 143; see N.Y. Times, July 12, 1979, at A20; July 10, 1979, at A11; Feb. 7, 1979, at B1; Feb. 6, 1979, at A1; Nov. 22, 1977, at B1; Feb. 26, 1977, at A1; Nov. 26, 1976, at A1.

209. THE INSANITY PLEA, *supra* note 45, at 143; see *In re Torsney*, 47 N.Y.2d 667, 670, 394 N.E.2d 262, 263, 420 N.Y.S.2d 192, 193 (1979).

210. *In re Torsney*, 47 N.Y.2d 667, 670, 394 N.E.2d 262, 263, 420 N.Y.S.2d 192, 193 (1979).

211. *Id.* at 670-71, 394 N.E.2d at 263-64, 420 N.Y.S.2d at 193-94.

himself or others.²¹² In a split decision, the court of appeals reinstated the trial court's conditional release order, concluding that Torsney was no longer suffering from a mental disease or defect and was no longer a danger to himself or others.²¹³

The authors' criticism of *Torsney* operates at two levels: one is an analysis of the procedural and evidentiary rules that were applied in the case, and the other is a straightforward polemical attack. Winslade and Ross properly recognize, as did the New York Court of Appeals, that New York's then existing rules for the burden of proof in insanity cases could explain the apparent contradiction in a finding of insanity based on mental disease or defect and a recommendation for release by mental health authorities on lack of mental illness following acquittal.²¹⁴ At the time of the *Torsney* case, insanity was a simple defense rather than an affirmative defense; therefore, an acquittal indicated only that the state failed to prove beyond a reasonable doubt that the defendant was sane.²¹⁵ Other jurisdictions have narrowed the gap between what the defendant must prove to establish insanity and what the state must show for mental commitment²¹⁶ by casting the insanity plea as an affirmative defense, which requires the defendant to prove insanity by a preponderance of the evidence.²¹⁷ Of course, a distinction remains in that the insanity defense refers to a mental condition existing at the time of the crime, and civil commitment requires a showing of present mental illness. Thus, even with the gap in standard of proof narrowed, the underlying issue of past rather than present mental disorder still may result in an acquittal without a basis for commitment.²¹⁸

Winslade and Ross cite what they label "another aspect of the foolishness engendered by the insanity defense" as operating in the *Torsney* case.²¹⁹ "In the trial itself the defense attorney argued that Torsney was mentally ill; the prosecutor argued that he was not. Through the post-verdict hearings and appeals, the defense attorney argued that Torsney was not mentally ill; the prosecution was now obliged to argue that he was."²²⁰ The authors attribute this situation to an unreasonable attitude toward mental illness: "It suggests that we believe insanity is something that comes and goes quixotically—now you have it, now you don't—and its appearance or disappearance is unrelated to any other event."²²¹ Surely, Winslade, a lawyer, must recognize that the situation he and Ross describe does not stem from such a belief in the nature of mental illness, but from the requirements of due process. In the criminal

212. *In re Torsney*, 66 A.D.2d 281, 294, 412 N.Y.S.2d 914, 921–22, *rev'd*, 47 N.Y.2d 667, 394 N.E.2d 262, 420 N.Y.S.2d 192 (1979).

213. *In re Torsney*, 47 N.Y.2d 667, 682, 394 N.E.2d 262, 272, 420 N.Y.S.2d 192, 201 (1979).

214. THE INSANITY PLEA, *supra* note 45, at 151–52; see *In re Torsney*, 47 N.Y.2d 667, 673–74, 394 N.E.2d 262, 265–66, 420 N.Y.S.2d 192, 195–96 (1979).

215. 47 N.Y.2d 667, 673–74, 394 N.E.2d 262, 265–66, 420 N.Y.S.2d 192, 195–96 (1979).

216. See *Addington v. Texas*, 441 U.S. 418 (1978) (holding due process requires that, in a civil commitment hearing, the state must bear the burden of proof by clear and convincing evidence).

217. See G. MORRIS, *supra* note 18, at 43 (reporting that twenty-five states require the defendant to establish his irresponsibility by a preponderance of the evidence).

218. See *In re Torsney*, 47 N.Y.2d 667, 676, 394 N.E.2d 262, 267, 420 N.Y.S.2d 192, 197 (1979).

219. THE INSANITY PLEA, *supra* note 45, at 157.

220. *Id.*

221. *Id.*

trial, the state must prove the defendant guilty beyond a reasonable doubt and must meet the affirmative defenses offered by the defendant; therefore, the state must necessarily offer proof that the defendant is sane.²²² Similarly, in the mental commitment hearing, due process requires the state to establish the elements necessary for involuntary commitment by clear and convincing evidence; therefore, the state must prove that the defendant is mentally ill.²²³ The explanation for the "foolishness" about which Winslade and Ross complain is the constitutional requirement of due process, not a theory about the transitory nature of mental illness.

The authors move to greater rhetorical heights when they offer a general judgment about *Torsney*; they claim that the case "demonstrates the error of trying to use involuntary treatment as an alternative to punishment."²²⁴ No real effort is made to develop an argument to establish this assertion; rather, Winslade and Ross are satisfied to rest with a question begging assertion: "If jurors voting for insanity acquittals are choosing hospitalization as an *alternative form* of punishment, they should at least know whether the prospect of treatment (as punishment) is a reality."²²⁵ Certainly nothing in the record of the case suggests that judges, juries, or even commentators view involuntary mental treatment following an insanity acquittal as punishment or a substitute for punishment.

Both the majority and the dissent in the New York Court of Appeals opinion rendered in *Torsney* make it quite clear that treatment is not to be viewed as punishment or as a substitute for punishment. The majority suggests that there is a need to avoid transforming "the hospital into a penitentiary."²²⁶ It also asserts that

[a]n individual's liberty cannot be deprived by 'warehousing' him in a mental institution when he is not suffering from a mental illness or defect and in no need of in-patient care and treatment on a ground which amounts to a presumption of a dangerous propensity flowing from, as in this case, an isolated, albeit tragic, incident occurring years ago.²²⁷

Finally, the opinion maintains that confinement of the insanity acquittee on any grounds other than present mental illness and dangerousness "amounts to nothing more than preventive detention, a concept foreign to our constitutional order."²²⁸ The dissenting opinion makes even clearer the error of the claim that *Torsney* was an unsuccessful effort "to use involuntary treatment as an alternative to punishment"²²⁹:

222. See *In re Winship*, 397 U.S. 358, 364 (1970) (holding that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"); see also *Patterson v. New York*, 432 U.S. 197 (1977) (holding that the due process clause permits placement of the burden of proof of affirmative defenses on the defendant).

223. See *Addington v. Texas*, 441 U.S. 418 (1978).

224. THE INSANITY PLEA, *supra* note 45, at 201.

225. *Id.* at 157 (emphasis added).

226. 47 N.Y.2d 667, 677, 394 N.E.2d 262, 267, 420 N.Y.S.2d 192, 198 (1979).

227. *Id.* at 682-83, 394 N.E.2d at 271, 420 N.Y.S.2d at 201.

228. *Id.* at 683, 394 N.E.2d at 271, 420 N.Y.S.2d at 201. See also *Jones v. United States*, 103 S. Ct. 3043 (1983), where the United States Supreme Court observed: "Different considerations underlie commitment of an insanity acquittee. As he was not convicted, he may not be punished. His confinement rests on his continuing illness and dangerousness." *Id.* at 3052 (footnote omitted).

229. THE INSANITY PLEA, *supra* note 45, at 201.

The verdict of not guilty by reason of mental disease or defect presumably resulted from a finding by the jury that the defendant at the time of the wrongful act suffered from symptoms which substantially limited his appreciation of "[t]he nature and consequence of such conduct" or "[t]hat such conduct was wrong." The purpose for institutionalizing someone acquitted for this reason is two-fold: to protect society from the threat that, because of a mental disorder, the detainee might again commit acts of violence, . . . and to rehabilitate him so that he may be released into society without the risk of further harm. Should the symptoms of the mental disorder disappear both justifications for continued confinement disappear as well. No longer is the detainee, because of a mental disorder, a threat to the safety of himself or others. Nor once the symptoms have finally been remitted, is he in need of rehabilitation. Detention beyond this point would constitute punishment which is impermissible since the confined person was acquitted by the jury and found not to have been responsible for his actions when the wrongful act was committed.²³⁰

The court of appeals correctly stated the law, and the polemics of Winslade and Ross will not alter the fact that this is the law. The jury may have been mistaken in its finding of mental disease or defect, the treating physicians may have erred in finding no present mental illness, and the releasing courts may have erred in concurring in the finding that Torsney was no longer mentally ill. None of these possibilities, however, supports the claim that the insanity defense failed in *Torsney* because he was not punished by continued detention in a hospital as a substitute for incarceration in a prison.

6. Ernest Smith, Jr.

The sixth case discussed by Winslade and Ross is that of Ernest Smith, Jr., who was charged with felony murder in a robbery, convicted, and sentenced to death.²³¹ The principal focus of the discussion is a critique of psychiatric evidence offered as the basis for prediction of dangerousness. At the penalty phase of Smith's trial, under the Texas bifurcated trial procedure, a court-appointed psychiatrist who had examined the defendant offered testimony to the effect that Smith was not mentally ill, not treatable, and "[t]hat certainly Mr. Smith is going to go ahead and commit other similar or same criminal acts if given the opportunity to do so."²³² The jury's finding at the penalty phase that Smith would probably commit criminal acts in the future resulted in mandatory imposition of the death penalty.²³³ As a result of an appeal to the United States Supreme Court, the death sentence was vacated on the grounds that Smith's attorney had not been given a report of the psychiatrist's examination and that the defendant had not been given required warnings prior to the examination or

230. 47 N.Y.2d 667, 689, 394 N.E.2d 262, 279, 420 N.Y.S.2d 192, 205-06 (1979) (dissenting opinion) (citations omitted).

231. THE INSANITY PLEA, *supra* note 45, at 159-80; see Smith v. Estelle, 445 F. Supp. 647 (N.D. Tex. 1977), *aff'd*, 602 F.2d 694 (5th Cir. 1979), *aff'd*, 451 U.S. 454 (1980); Smith v. State, 540 S.W.2d 693 (Tex. Crim. App. 1976), *cert. denied*, 430 U.S. 922 (1977). See generally White, *Waiver and the Death Penalty: The Implications of Estelle v. Smith*, 72 J. CRIM. L. & CRIMINOLOGY 1522 (1981); Note, *The Fifth Amendment and Compelled Psychiatric Examinations: Implications of Estelle v. Smith*, 50 GEO. WASH. L. REV. 275 (1982); Note, *Estelle v. Smith: Expanding Constitutional Safeguards in Sentencing Proceedings*, 9 OHIO N.U.L. REV. 529 (1982).

232. THE INSANITY PLEA, *supra* note 45, at 168-69.

233. Estelle v. Smith, 451 U.S. 454, 460 (1980).

informed that the examination could be used in the sentencing hearing.²³⁴ The Court's decision, however, did not preclude the use of psychiatric testimony at any penalty or sentencing hearings.²³⁵

Winslade and Ross criticize the *Smith* case as one which "exemplifies the problem of psychiatric testimony, even if insanity is not at issue, when psychiatrists become advocates for specific decisions, using the cloak of their medical authority in the absence of any expert information on the topic at hand."²³⁶ The issue raised by the *Smith* case, however, is more complex than a matter of psychiatric advocacy; it is really an issue of the prediction of dangerousness and the need to develop both legal and psychiatric criteria that are reliable and workable.²³⁷ As the United States Supreme Court noted in its opinion in *Estelle v. Smith*,²³⁸ "[P]rediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system."²³⁹ The Supreme Court similarly recognized the need to utilize psychiatric evidence in making predictions of dangerousness. Castigating psychiatric evidence is an improper response; rather, criteria should be developed for judging the relevance and reliability of psychiatric evidence to particular issues arising in law courts.

7. John Hinckley

The final case discussed by Winslade and Ross is that of John Hinckley, who was charged with attempted assassination of the President of the United States, assault on a federal officer, and related offenses under the District of Columbia Code.²⁴⁰ The authors' criticism of the insanity verdict rendered in the *Hinckley* case is focused on what they perceive to be a failure of the jury system to operate within the parameters established by the insanity defense. Their general assessment is that "[t]he case of John Hinckley shows how jury members are manipulated not only by psychiatrists but also by one another."²⁴¹ Winslade and Ross suggest that *Hinckley* can be criticized along the general lines developed throughout the book, including problems inherent in allocating responsibility, difficulties in identifying mental states

234. *Id.* at 466-71.

235. *Id.* at 472-73.

236. THE INSANITY PLEA, *supra* note 45, at 201-02.

237. See Dershowitz, *The Role of Psychiatry in the Sentencing Process*, 1 INT'L J. L. & PSYCHIATRY 63 (1978); Hammond, *Predictions of Dangerousness in Texas: Psychotherapists' Conflicting Duties, Their Potential Liability, and Possible Solutions*, 12 ST. MARY'S L.J. 141 (1980); Shah, *Dangerousness: A Paradigm for Exploring Some Issues in Law and Psychology*, 33 AM. PSYCHOLOGIST 224 (1978). See generally J. MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR (1981).

238. 451 U.S. 454 (1980).

239. *Id.* at 473 (quoting *Jurek v. Texas*, 428 U.S. 262, 275-76 (1976)).

240. THE INSANITY PLEA, *supra* note 45, at 181-97. See generally *The Insanity Plea on Trial*, NEWSWEEK, May 24, 1982, at 56; *Insane on All Counts*, TIME, July 5, 1982, at 22; *Hinckley Cleared but Is Held Insane in Reagan Attack*, N.Y. TIMES, June 22, 1981, at A1, col. 6 & D27, col. 1. A number of judicial opinions have arisen out of pretrial litigation concerning statements made by Hinckley to authorities in psychiatric examinations. See *United States v. Hinckley*, 672 F.2d 115 (D.C. Cir. 1982); *United States v. Hinckley*, 529 F. Supp. 520 (D.D.C. 1982); *United States v. Hinckley*, 525 F. Supp. 1342 (D.D.C. 1981). See also *Hinckley's Trial Competency Exam Statements Not Suppressed*, 6 MENTAL DISABILITY L. REP. 69, 69-70 (1982); *"Poisoned Fruit" Not Admissible*, 6 MENTAL DISABILITY L. REP. 70 (1982).

241. THE INSANITY PLEA, *supra* note 45, at 202.

that mitigate guilt, problems with post-acquittal disposition, and, above all, the asserted process whereby the jury empathizes and develops an understanding of the behavior of the defendant.²⁴²

The authors give three issues particular attention in discussing *Hinckley*: the legal standard for insanity,²⁴³ the placement of the burden of proof,²⁴⁴ and the use of scientific test results.²⁴⁵ The test for insanity is viewed as raising two problems: the lack of a well-defined standard for incapacity and the difficulty of determining as a matter of fact whether sufficient incapacity exists. Addressing the latter problem, Winslade and Ross maintain: "The problem of how much capacity or how much understanding is always present and essentially insoluble."²⁴⁶ On the former question, the authors assert: "Sanity and insanity are, of course, legal, not psychiatric, terms. The law has been notoriously unsuccessful in defining insanity."²⁴⁷ Certainly the law has attempted to define insanity, for what else were judges and code drafters doing when they developed the *M'Naghten* rules or the Model Penal Code test? The law is open-ended to a degree, permitting the jury to use its notions of normalcy and its understanding of the community sense of justice. This is reflected in statutory standards such as that of the Model Penal Code, which requires a lack of "substantial capacity" to appreciate the nature of one's actions or to conform the actions to the requirements of the law.²⁴⁸ Judicial opinions also recognize the existence of and the need for jury discretion in considering the insanity plea; as the *Browner* court observed:

The jury is concerned with applying the community understanding of this broad rule to particular lay and medical facts. When the matter is unclear it naturally will call on its own sense of justice to help it determine the matter. There is wisdom in the view that a jury generally understands well enough that an instruction composed in flexible terms gives it sufficient latitude so that, without disregarding the instruction, it can provide that application of the instruction which harmonizes with its sense of justice.²⁴⁹

Concern with existing insanity tests is proper: there is certainly merit in the suggestions that the test should be limited to cases in which capacity to appreciate or understand the nature, consequences, or wrongfulness of one's action is impaired, and that tests which provide an independent criteria focusing on ability to conform or recognize an irresistible impulse ought to be abandoned.²⁵⁰ The problems with some of the current tests, however, do not justify abandoning the insanity defense.

242. *Id.* at 183-89.

243. *Id.* at 188-89.

244. *Id.* at 189-91.

245. *Id.* at 191-93.

246. *Id.* at 188.

247. *Id.* at 189.

248. MODEL PENAL CODE § 4.01(1) (Proposed Official Draft 1962).

249. *United States v. Browner*, 471 F.2d 969, 988 (D.C. Cir. 1972).

250. See, e.g., COMPREHENSIVE CRIME CONTROL ACT OF 1983: A PROPOSAL TO THE CONGRESS FROM THE PRESIDENT OF THE UNITED STATES, H.R. Doc. No. 98-32, 98th Cong., 1st Sess. 170 (1983) [hereinafter cited as COMPREHENSIVE CRIME CONTROL ACT], which provides in § 502 the following amendment to 18 U.S.C. § 1 (1976):

It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of mental disease or defect, was unable to appreciate

Winslade and Ross correctly report that the federal law, under which Hinckley was tried, required the prosecution to prove, once the insanity issue properly was raised, that the defendant was sane beyond a reasonable doubt.²⁵¹ Jurors were quoted by the press as saying that they felt compelled to hand down a verdict of not guilty by reason of insanity because of the law on burden of proof.²⁵² According to Winslade and Ross, "It is, however, hard to imagine how any prosecutor could prove John Hinckley, or anyone else, for that matter, sane beyond a reasonable doubt."²⁵³ They conclude that "[p]lacing the burden of proving sanity on the prosecution and then requiring that the standard of proof be 'beyond a reasonable doubt' should have assured a not guilty by reason of insanity verdict for John Hinckley."²⁵⁴ The authors' criticism of the placement of the burden of proof of sanity on the prosecution has merit; certainly the suggestions that have been made by legislators and commentators for casting the insanity defense as an affirmative defense deserve serious consideration.²⁵⁵

The third basis for criticism of the *Hinckley* case emphasized by Winslade and Ross is the admission of technical test results by the defense "to bolster the assertion that Hinckley was schizophrenic."²⁵⁶ Two objections are directed at this evidence. The first is that it carries undue weight with the jurors since they are likely to focus on

the nature and quality of the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

Id. at 170. See generally D. HERMANN, *supra* note 15, at 128-52; Bonnie, *supra* note 11, at 194.

251. THE INSANITY PLEA, *supra* note 45, at 189. See Trial Transcript, vol. 83, United States v. Hinckley, Crim. No. 81-306 (D.D.C. June 18, 1982), reprinted in *Hearings on the Insanity Defense*, *supra* note 1, at 183, 191-92, for the instruction given to the Hinckley jury that provided:

The burden is on the Government to prove beyond a reasonable doubt either that the defendant was not suffering from a mental disease or defect on March 30, 1981, or else that he nevertheless had substantial capacity on that date both to conform his conduct to the requirements of the law and to appreciate the wrongfulness of his conduct.

If the Government has not established this to your satisfaction, beyond a reasonable doubt, then you shall bring a verdict of not guilty by reason of insanity.

252. THE INSANITY PLEA, *supra* note 45, at 189. See Cohen, *supra* note 4, at 13-16, observing:

If the Law truly means what it says, then John W. Hinckley Jr. had to be found not guilty of the attempted murder of the President of the United States. Not because he didn't do it—and not even because the defense proved that mental illness caused his acts—but because the jury could not help entertaining a reasonable doubt about Hinckley's sanity at the time of the shooting. As a matter of logic, that reasonable doubt left no lawful choice but to acquit the man who shot President Reagan and three other people in full view of hundreds of millions of television watchers.

Id. at 13.

253. THE INSANITY PLEA, *supra* note 45, at 189.

254. *Id.* at 190.

255. See, e.g., COMPREHENSIVE CRIME CONTROL ACT, *supra* note 250, at 170 ("The defendant has the burden of proving the defense of insanity by clear and convincing evidence."). See also Kaufman, *The Insanity Plea on Trial*, N.Y. Times, August 8, 1982, § 6 (Magazine), at 16, 16-20. Judge Kaufman suggests consideration of placing the burden of proof on the defendant:

[Q]uite a few states and the District of Columbia now shift the burden of proof to the defendant and require him to show by a preponderance of evidence, that, at the time of his crime, he lacked the requisite mental capacity to be responsible. The British also place the burden of proof on the defendant. Given the difficulty in proving an individual sane beyond a reasonable doubt, especially when that person has committed a heinous offense, a rule placing the burden of proof on the defendant seems preferable.

Id. at 20.

256. THE INSANITY PLEA, *supra* note 45, at 191. The authors emphasize the admission of "a CAT scan—a kind of X-ray of the brain using computerized axial tomography." *Id.*

this "hard evidence—visual, physiological findings" to rationalize their verdict.²⁵⁷ The second is that this evidence is pseudo-scientific, or at least open to dispute among medical authorities.²⁵⁸ The result, according to *The Insanity Plea*, is that

[a] jury of twelve very ordinary people were left to decide whether group A of highly trained medical specialists was correct in thinking that there was some relationship between Hinckley's brain quantity and his behavior, or whether group B of highly trained medical specialists was correct in saying that there was no known link between Hinckley's brain quantity and his behavior.²⁵⁹

Although there may be grounds for considering whether the relevance of this data to a jury charged with the ultimate responsibility of determining the existence of mental disease or defect outweighs the prejudicial effect of such evidence, the authors' account of *Hinckley* undercuts the significance of their stated concern with this evidence. They state that subsequent reports of the jury deliberations "suggest that technical legal questions and technical medical questions were the last thing on their minds."²⁶⁰ "The jurors seemed to focus on a narrow view of life, a view that seemed reasonable to them. John Hinckley certainly didn't seem reasonable to them."²⁶¹ In a sense, the authors' critique is addressed less to issues about the nature and quality of the evidence and more to what they consider to be the inadequacy of the jury's deliberations in *Hinckley*.

III. CONCLUSION

On the basis of the seven cases examined in *The Insanity Plea*, the authors make four recommendations: (1) the elimination of the insanity defense, (2) the elimination of most psychiatric testimony, including all testimony by psychiatrists about the defendant's state of mind, (3) the adoption of the guilty but mentally ill plea, and (4) the separation of guilt and penalty phases of a trial when the defendant pleads mental illness.²⁶² Adoption of these recommendations would constitute a radical transformation of the criminal law and a clear abandonment of traditional concepts of criminal guilt and responsibility. Although these recommendations may have merit, the case analyses provided by Winslade and Ross are insufficient to support the need for or to provide justification for this radical abandonment of the present criminal law.

The general public would be mistaken to formulate its opinion about the insanity defense from, and officials would err in basing any action on, the case analysis and argument developed in *The Insanity Plea*. The case studies suffer from misleading statements and exaggerated analysis. The argument developed is polemical rather than reasoned. Most certainly the book suffers from the lack of an empirical base to support the sweeping recommendations made by its authors.

257. *Id.* at 192.

258. *Id.* Winslade and Ross set forth the prosecution's argument against admitting the CAT-scan results: "there was no evidence, either diagnostic or causal, to link reduced brain tissue to schizophrenia."

259. *Id.*

260. *Id.* at 193.

261. *Id.*

262. *Id.* at 201.

Winslade and Ross anticipate rejection of their proposals on a principled basis by those who would support the insanity defense and traditional ideas of guilt and responsibility when they remark: "Many will complain that the elimination of the not guilty by reason of insanity plea is a symbolic blow to our moral stature as a society willing to extend understanding and compassion toward our less fortunate members."²⁶³ The issue is not one of "understanding and compassion," however; at issue is the moral status of the criminal law itself. Punishment necessarily requires blameworthiness. To punish persons who are insane, who suffer an impairment of understanding so that they lack the capacity for conforming conduct, is to punish persons who are beyond blaming. As one commentator has stated:

The criminal law as we know it today does associate a substantial condemnatory onus with conviction for a crime. So long as this is so a just and humane legal system has an obligation to make a distinction between those who are eligible for this condemnation and those who are not.²⁶⁴

Winslade and Ross commit the fallacy of equivocation²⁶⁵ when they claim that abolition of the insanity defense will have the effect that "[t]he guilty will be found guilty."²⁶⁶ The authors equate status as a causal agent with criminal guilt. But criminal guilt supposes a responsible, not merely a causal agent. The significance of the insanity defense is that it provides the criteria by which society can establish, according to philosophical tradition, who is a responsible person. Without the legal defense of insanity, the criminal law, and society itself, would be deprived of an essential instrument for determining the proper subjects of punishment. A crucial distinction exists between the individual who has freely and knowingly undertaken to inflict violence or harm on another person and the individual who has brought about identical harm while being in the grip of a mental condition precluding appreciation and control of his action. The legal defense of insanity captures this crucial distinction.

263. *Id.* at 223-24.

264. Kadish, *supra* note 116, at 283.

265. See S. ENGEL, WITH GOOD REASON: AN INTRODUCTION TO INFORMAL FALLACIES (1976). The author describes the logical error implicit in the argument made by Winslade and Ross:

To commit the *fallacy of equivocation* is to allow a key word in an argument to shift its meaning in the course of an argument. Consider this example:

2) Only man is rational.

No woman is a man.

Therefore no woman is rational.

This argument would be valid if the word *man* had the same meaning each time it occurred. But for the first premise to be true, *man* must mean human, whereas it must mean *male* for the second premise to be true. When the change in meaning of a key word during an argument is especially subtle, the conclusion will seem to follow clearly from the premises and the argument will appear considerably more sound than it is.

Id. at 59 (emphasis in original).

266. THE INSANITY PLEA, *supra* note 45, at 226.

